Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

ESTATE THOMAS MALL, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

LEON A. KENDALL *
General Counsel
TERRITORIAL COURT OF THE VIRGIN ISLANDS
Barbel Plaza
Post Office Box 70
St. Thomas, V.I. 00801
(809) 774-6680
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does 48 U.S.C. Section 1612(b), as amended, *ex proprio vigore* divest the District Court of the Virgin Islands of jurisdiction over local Forcible Entry and Detainer (F.E.D.) actions?

PARTIES TO THE PROCEEDINGS

Petitioner and Appellee/cross-appellant below, TERRITORIAL COURT OF THE VIRGIN ISLANDS, is a court of record established in 1977 pursuant to 48 U.S.C. Section 1611. See 4 V.I.C. Section 2. Respondent, ESTATE THOMAS MALL, INC., was Appellant/cross-appellee below and is Petitioner's landlord with respect to the premises leased by Petitioner for the conduct of its Juvenile Delinquency Prevention and Pre-trial Intervention Program, which premises are the subject of the F.E.D. action giving rise to this petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT 48 U.S.C. SECTION 1612(b) AS AMENDED DID NOT *EX PROPRIO VIGORE* DIVEST THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OVER LOCAL FORCIBLE ENTRY AND DETAINER ACTIONS	5
II. THE PHRASE "THEN VESTED" AS USED IN 48 U.S.C. SECTION 1612(b) AS AMENDED, INCLUDES CASES "ALREADY VESTED" IN ITS CONSTRUCTION	8
III. THE INCLUSION OF CASES "ALREADY VESTED" IN THE CONSTRUCTION OF SECTION 1612(b), AS AMENDED, WOULD NOT THROW CIVIL ACTIONS IN THE DISTRICT COURT INTO "CONFUSION"	15
CONCLUSION	19

TABLE OF CONTENTS—Continued

Page

APPENDICES

Appendix A:
Opinion of the Court of Appeals 1a

Appendix B:
Judgment of the Court of Appeals 17a

Appendix C:
Memorandum Opinion of the District Court 24a

Appendix D:
Order of the District Court 26a

Appendix E:
Pertinent constitutional and statutory provisions.. 28a

TABLE OF AUTHORITIES

Cases: Page

Agana Bay Development Co. Ltd. v. *Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976) 13, 14
Carter v. *Gear*, 197 U.S. 348, 25 S.Ct. 491, 49 L.Ed. 787 (1905) 13
Christianson v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166 (1988) 7, 8
Groves v. *Slaughter*, 40 U.S. 449 (1841) 7
Hudson Distributors, Inc. v. *Eli Lilly & Co.*, 84 S.Ct. 1273, 377 U.S. 386, L.Ed.2d 394 (1964) 12
In Re Petition of Finance Committee, etc., 242 F.2d 902, 903 (3d Cir. 1957) 15
Kramer v. *Government of the V.I.*, 8 V.I. 499, 453 F.2d 1246, 1247 (3d Cir. 1971) 14
Port Construction Co. v. *Government of the V.I.*, 5 V.I., 549, 359 F.2d 663 (3d Cir. 1961) 14
New York State Dept. of Social Services v. *Dublino*, 93 S.Ct. 2507, 413 U.S. 405, 37 L.Ed.2d 688 (1973) 11
Richards v. *United States*, 82 S.Ct. 585, 369 U.S. 1, 7 L.Ed.2d 492 (1962) 13
United States v. *Kirby*, 74 U.S. (7 Wall.) 482, 486-487 (1868) 10

Constitutional Provisions:

U.S. Const. Art. IV, Section 3, Clause 2 ..... 2, 7

Statutes and Regulations:

United States Code:

28 U.S.C. Section 1254(1) 2
48 U.S.C. Section 1541 ..... 3, 15
48 U.S.C. Section 1611 ii
48 U.S.C. Section 1612 2
48 U.S.C. Section 1612(b) ..... *passim*

Virgin Islands Code:

Title 4, Section 2 ii
Title 4, Section 71 16
Title 4, Section 76 2
Title 4, Section 76(a) 10, 18

TABLE OF AUTHORITIES—Continued

Page

Title 5, Section 5 ..... 16, 17
Title 28, Section 782 ..... 2, 3, 6
Title 28, Section 782 (b) 3, 7, 10, 11, 18

Legislative Materials:

130 Cong. Rec. S 10527 (August 10, 1984) 3, 6, 10-12
P.L. 98-454 ..... 3-6, 11
P.L. 98-454, Section 703 (b) 11
P.L. 98-454, Section 1005 10
Act No. 3876, codified at 4 V.I.C. Sec. 71 (Sept. 9, 1976) 16
Act No. 5176 16
Act No. 5594, effective Oct. 1, 1991 ..... 10, 18
Revised Organic Act, of 1954, as amended 3, 7, 9, 18
Revised Organic Act of 1954, as amended, Section 22 ..... 2, 5, 6, 11

Miscellaneous:

Black's Law Dictionary (Special 5th ed. 1979) 7

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PETITION FOR WRIT OF CERTIORARI

Petitioner, TERRITORIAL COURT OF THE VIRGIN ISLANDS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on January 11, 1991.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 923 F.2d 258 (3rd Cir. 1991), and is reprinted in the Appendix hereto ("App.") at 1a. The Memorandum Opinion of the District Court of the Virgin Islands (Farnan, J.) has not been reported to date but is reprinted at App. 17a. The Final Order of the District Court of the Virgin Islands has not been reported to date but is reprinted at App. 24a.

JURISDICTION

Respondent filed an action against Petitioner for Forcible Entry and Detainer on June 14, 1990 in the District Court of the Virgin Islands. On June 29, 1990 Petitioner moved to dismiss for, among other things, lack of subject matter jurisdiction. The District Court entered its Final Order on August 31, 1990 in which it denied the Motion to Dismiss and denied the F.E.D. petition on the condition that Petitioner pay all withheld rent by September 14, 1990, failing which Respondent could take possession of the premises on October 1, 1990. App. 24a. Thereafter, on September 6, 1990 the Court filed its Memorandum Opinion. Petitioner appealed and on January 11, 1991, the Court of Appeals held that the District Court had subject matter jurisdiction but reversed and remanded the case with intsructions to the District Court to Dismiss the Complaint on other grounds. On February 1, 1991, Petitioner filed a Petition for Rehearing of the issue of the District Court's subject matter jurisdiction. On February 22, 1991 the Third Circuit denied the Petition for Rehearing. The jurisdiction of this Court to review the Judgment of the Third Circuit is based upon 28 U.S.C. Section 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions pertinent to this case include Article IV, Section 3, Clause 2 of the United States Constitution; Section 22 of the Revised Organic Act of 1954, as amended, 48 U.S.C. Section 1612; Section 76 of Title 4 of the Virgin Islands Code and Section 782 of Title 28 of the Virgin Islands Code. These provisions are set forth at App. 28a.

STATEMENT OF THE CASE

This petition for Writ of Certiorari involves the refusal of the Federal Judiciary in the Virgin Islands to comply with the 1984 Congressional enactment granting

increased judicial autonomy to the Government of the United States Virgin Islands.

In 1984 Congress enacted P.L. 98-454 which significantly amended the Revised Organic Act of the Virgin Islands codified at 48 U.S.C. Section 1541 et seq. In so doing, Congress stated that it intended to "abolish the concurrent jurisdiction of the District Court over causes based on local law [if] local law has vested jurisdiction over such causes in the local court." 130 Cong. Rec. S 10527 (August 10, 1984). In 1984 and prior thereto, jurisdiction over Forcible Entry and Detainer (F.E.D.) actions which are purely local in nature was vested in the local Territorial Court by the local Legislature. See 28 V.I.C. Section 782.

Despite the unequivocal statement of Congressional intent in amending the Revised Organic Act, Respondent filed in the Federal District Court of the Virgin Islands an action for Forcible Entry and Detainer against Petitioner on June 14, 1990. Petitioner moved to dismiss the action for, among other things, lack of subject matter jurisdiction. From the inception, Petitioner has contended that pursuant to 48 U.S.C. Section 1612(b), as amended, the District Court lacks jurisdiction over F.E.D. actions since such actions were within the rubric of those cases "then vested by local law in the local courts" thereby depriving the District Court of jurisdiction over them.

In its Memorandum Opinion, the District Court, without addressing any of Petitioner's arguments, merely concluded that it had concurrent jurisdiction pursuant to 28 V.I.C. Section 782(b), an anachronistic local law that was repealed by implication by P.L. 98-454. Indeed, the Third Circuit stated that the Virgin Islands Legislature has no power to grant jurisdiction to the District Court. App. 7a.

The Territorial Court filed a Notice of Appeal on September 11, 1990. On January 11, 1991, the Third Cir-

cuit affirmed the District Court's exercise of subject matter jurisdiction while reversing with instructions to dismiss the action on other grounds. The Third Circuit held that the phrase "then vested" in 48 U.S.C. Section 1612(b) means "hereafter vested" and as such the statute did not *ex proprio vigore* divest the District Court of jurisdiction over F.E.D. actions. According to the court "such divestment will not occur until the Virgin Islands legislature enacts a law which effects the power created by the 1984 Amendments." App. 13a.

On February 1, 1991, the Territorial Court filed a petition for rehearing of the portion of the decision holding that the District Court had subject matter jurisdiction over the F.E.D. action. In its petition for rehearing, the Territorial Court contended that the phrase "then vested" includes both cases "already vested" and those "hereafter vested" and that these definitions were not mutually exclusive of each other. In support of this contention petitioner relied upon the plain meaning of the phrase and the legislative history of the 1984 amendments to 48 U.S.C. Section 1612(b). On February 22, 1991, the Third Circuit denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of first impression regarding the judicial autonomy of the Territorial Court of the Virgin Islands to hear and decide purely local causes of action as mandated by Congress. The resolution of this issue, however, is of broader significance inasmuch as it will affect the autonomy and stature of the entire Virgin Islands Government. The Territorial Court has pursued this litigation primarily because of the apparent reluctance of the Federal Judiciary to obey the unambiguous command of Congress that upon the effective date of P.L. 98-454, the District Court would be prohibited from exercising jurisdiction over local causes of action if local law has vested such jurisdiction in the local court, i.e. Territorial Court.

The District Court's decision that it has subject matter jurisdiction over the case at bar and the Third Circuit's affirmance of that decision undermines the will of Congress and threatens the integrity and autonomy of the Territorial Judiciary in particular and the Territorial Government in general. Accordingly, it should not be permitted to stand.

In concluding that the District Court had subject matter jurisdiction, the Third Circuit violated time honored rules of statutory construction and relied on mere speculation as regards the potential Federal Court disruption if Petitioner's contentions were accepted. Such speculation was contrary to existing statistics and totally unsupportable by any evidence in the record.

I. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT 48 U.S.C. SECTION 1612(b), AS AMENDED, DID NOT *EX PROPRIO VIGORE* DIVEST THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OVER LOCAL FORCIBLE ENTRY AND DETAINER (F.E.D.) ACTIONS.

In 1984 Congress enacted P.L. 98-454 which eliminated the District Court's concurrent jurisdiction over local matters where local law had vested jurisdiction in the local courts. This comprehensive amendment to the Act vitiated those provisions of local law which had heretofore vested in the District Court of the Virgin Islands concurrent jurisdiction over purely local matters. The specific provision of P.L. 98-454 which contained this progressive step for the people of the Virgin Islands is Section 22(b) 48 U.S.C. Section 1612(b)), which provides in pertinent part:

> . . . The District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands *the jurisdiction over which is not then vested by local law* [1] *in the local courts of the Virgin Islands . . . Emphasis supplied.*

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[1] At the time of enactment of P.L. 98-454, the Virgin Islands' Legislature had already vested original jurisdiction over F.E.D.

The Congressional Record verifies the elimination of concurrent jurisdiction. Specifically, in enacting P.L. 98-454, the U.S. Senate stated that,[2] among other things,

> . . . this bill would *abolish the concurrent jurisdiction of the District Court over causes based on local law*, of [sic] local law has vested jurisdiction over them in the local courts. See Section 22(b).
>
> . . .
>
> The purpose of Section 22(b) is to *eliminate the present situation of both the District Court and the local court having jurisdiction over strictly local causes.* Upon the effective date the *District Court will not [sic] longer have jurisdiction over any cause over which local law has vested jurisdiction in the local courts* . . .
>
> . . .
>
> . . . by vesting jurisdiction in the local courts, the local law will have the effect of *divesting the District Court of jurisdiction. Emphasis supplied.*

The foregoing statutory language and accompanying Legislative History clearly warrant the conclusion that 48

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actions in the local court pursuant to 28 V.I.C. Section 782 which provides as follows:

> *Action for Forcible Entry and Detainer*
>
> "(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.
>
> (b) If the unpaid rent or the value of the real property involved does not exceed $500, exclusive of interest and costs, the municipal court shall have exclusive jurisdiction of such action. In all other cases, the municipal court and the district court shall have concurrent jurisdiction."

[2] 130 Cong. Rec. S 10527 (August 10, 1984).

U.S.C. Section 1612(b), as amended, *ex proprio vigore*[3] divested the District Court of concurrent jurisdiction over F.E.D. actions because jurisdiction over such actions were already ("then") vested by local law, i.e. 28 V.I.C. Section 782(b), in the local court.

In the face of this clear statement of the law and its accompanying legislative history, the Third Circuit nonetheless concluded that "there is nothing in the language of Section 1612(b) that suggests that Congress intended to divest the District Court of jurisdiction over local action immediately." App. 11a-12a. Based upon this conclusion, the Court held that "Section 1612(b) does not *ex proprio vigore* divest the District Court of jurisdiction over local matters." App. 13a. The Third Circuit's construction of the statute can only be considered as an attempt to obfuscate its plain meaning and legislative history relative to F.E.D. actions. This construction is clearly erroneous because it would require the local Legislature to do what it had already done in 28 V.I.C. Section 782(b), i.e. vest original jurisdiction over F.E.D. actions in the local court.

It is settled that "courts created by statute can have no jurisdiction but such as the statute confers." *Chris-*

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[3] *Ex proprio vigore* means "by its own force." Black's Law Dictionary 522 (Special 5th Ed. 1979). It essentially refers to the general principle that some constitutional provisions are self-executing. Provisions that are not self-executing require legislation to effectuate their purposes. See *Groves* v. *Slaughter*, 40 U.S. 449 (1841). Thus, where constitutional provisions are in issue, it must be determined whether they apply "by their own force" or whether they are subject to triggering legislation. The Revised Organic Act of the Virgin Islands, as amended, is the Constitution of the Virgin Islands (U.S. Const., Art. 4, Sec. 3), thus the Third Circuit's consideration of the applicability of the principle of *ex proprio vigore* was proper. Such as analysis however, establishes beyond doubt that the District Court was not granted jurisdiction over the F.E.D. case at bar by Congress. What Congress did not grant, the District Court does not have, thus the congressional prohibition in 48 U.S.C. Section 1612(b) with respect to F.E.D. actions applied *ex proprio vigore*.

tianson v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178 (1988)). Indeed, "a court may not in any case, even in the interest of justice extend its jurisdiction where none exists." 108 S.Ct. at 2178. By holding that 48 U.S.C. Section 1612(b), as amended, does not *ex proprio vigore* divest the District Court of jurisdiction over local matters, the Third Circuit in effect violated the holding in *Christianson* by impermissibly extending the District Court's jurisdiction over F.E.D. actions where none existed in the statute in question.

It is clear that, with respect to F.E.D. actions, the phrase "then vested" in section 1612(b) means "already vested." Accordingly, the Writ should be granted to correct the erroneous conclusion of the Third Circuit to the contrary.

II. THE PHRASE "THEN VESTED" AS USED IN 48 U.S.C. SECTION 1612(b), AS AMENDED, INCLUDES CASES "ALREADY VESTED" IN ITS CONSTRUCTION.

In affirming the District Court's exercise of subject matter jurisdiction, the Third Circuit ruled that the phrase "then vested" as used in 48 U.S.C. Section 1612 (b) means "hereafter vested," instead of "already vested." While this ruling was clearly erroneous as noted heretofore, assuming, *arguendo*, its correctness, it is submitted that also included in the phrase are cases "already" vested.

Petitioner submits that the terms "already vested" and "hereafter vested" are not mutually exclusive and that both may be included in the statutory construction of the phrase "then vested."

If this critical portion of the Court's decision is permitted to stand, the result would be the continued denial of exclusive jurisdiction in the Territorial Court over F.E.D. actions. Additionally, the District Court will be seen to be undermining the expanded autonomy of the local judiciary, contrary to Congressional intent and policy.

The Third Circuit's decision that the District Court had subject matter jurisdiction over the F.E.D. action at bar is based upon its conclusion that 48 U.S.C. Section 1612(b), as amended, takes effect only when the Virgin Islands Legislature, after the date of the 1984 Amendment to the Revised Organic Act, "passes a law which vests jurisdiction over local actions in local courts." App. 11a. According to the Court, the phrase "then vested" as used in Section 1612(b) could mean either "already vested" or "hereafter vested". App. 5a, 6a. The Court found the latter meaning to be correct, but did not consider the possibility of both being included in the construction of the phrase "then vested." It is respectfully submitted that because the Court's finding was limited to an either/or analysis, the Writ should be granted to allow consideration of the theory that both terms may be included, as explained below.

Congress was aware that the Virgin Islands Legislature had vested jurisdiction over certain local actions in the local courts prior to the enactment of the 1984 Amendments to the Revised Organic Act. It was also aware that the jurisdiction over certain other local causes was not vested by the Virgin Islands Legislature in the local courts at the time of the 1984 Amendments. Thus, it is apparent that Congress was dealing with both situations when it used the phrase "then vested," i.e. (1) immediate divestment where jurisdiction was already vested in local courts and (2) subsequent divestment where jurisdiction was not already vested in local courts.

As to the local causes which were already vested by local law in the local courts at the time of the Amendments, Congress could not have intended for the Virgin Islands Legislature to re-pass those laws that were already on the books, e.g., those dealing with the Territorial Court's original jurisdiction over F.E.D. actions. Yet to exclude "already vested" from the phrase "then vested" would lead to precisely such an absurd result

which, according to this Court, must be avoided in construing statutes. *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482, 486-487 (1868).

In the case at bar, on the effective date of the 1984 Amendment the Virgin Islands Legislature had already vested original jurisdiction in the Territorial Court over F.E.D. actions, regardless of the amount in controversy or the value of the property. 28 V.I.C. Section 782(b). Clearly, there is no need to re-enact those F.E.D. provisions. Thus, the possible increase in civil jurisdiction which may become effective in October 1991 [4] would not add any jurisdiction over F.E.D. actions in the Territorial Court. Accordingly, the phrase "then vested" must include "already vested" as it relates to F.E.D. actions.

Moreover, this interpretation is consistent with Congress' express intention to "abolish the *concurrent* jurisdiction of the District Court over causes based on local law [i]f local law *has vested* jurisdiction over them in the local courts." 130 Cong. Rec. S10527 (August 10, 1984). According to Congress, "upon the effective date, the District Court will not [sic] longer have jurisdiction over any cause over which local law *has vested* jurisdiction in the local courts." *Id.* The Third Circuit adopted the view that the phrase "upon the effective date" means "upon the effective date of an Act by the Virgin Islands Legislature divesting the District Court of jurisdiction." App. 8a. However, this reading is clearly contrary to the effective date set forth by Congress in the legislation. Specifically, Section 1005 of P.L. 89-454 provides in pertinent part:

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[4] On August 29, 1990, the Virgin Islands' Legislature enacted Act No. 5594 which amends 4 V.I.C. Section 76(a) to vest in the Territorial Court, effective October 1, 1991, jurisdiction over all civil actions regardless of the amount in controversy. Postponement of the October 1991 effective date is under consideration by the Judiciary Committee of the Virgin Islands' Legislature pending construction of the new Territorial Courthouse.

> Title *VII*, . . . [. . . amending sections . . . 1561,, 1611, *1612*, 1613, 1614, 1615, 1617 . . .] *shall become effective on the ninetieth day following their enactment* [October 5, 1984]. *Emphasis supplied.*

Title VII of P.L. 98-454 deals with the Virgin Islands. The effective date of 48 U.S.C. Section 1612(b) is thus a matter of unambiguously stated law.[5] Given Congress' intent "to eliminate the *present situation* of *both* the District Court and the local court having jurisdiction over strictly local causes," it is obvious that Congress intended that upon the effective date of the Amendments, the District Court would be automatically divested, *ex proprio vigore*, of concurrent jurisdiction over those local causes jurisdiction over which "has [already been] vested" by local law in the local courts, i.e., F.E.D. actions. 28 V.I.C. Section 782(b).

Further, in setting forth the reasons for P.L. 98-454, Congress stated:

> ". . . this bill would abolish the concurrent jurisdiction of the District Court over causes based on local law if [sic] local law *has vested* jurisdiction over them in the local courts. See Section 22b. *Emphasis supplied.*

130 Cong. Rec. S.10527 (August 10, 1984).

Again, the use of the past tense by Congress is indicative of an intent to abolish the District Court's jurisdiction over purely local actions upon the effective date of the amendment if those matters were "already vested" by local law in the local courts.

It is settled that Federal Statutes cannot be interpreted to negate their own stated purposes. *New York State Department of Social Services* v. *Dublino*, 93 S.Ct. 2507,

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[5] See, also Section 703(b) of P.L. 98-454 which ensures against the "loss of jurisdiction by the District Court over any complaint or proceeding pending in it on the date preceeding the *effective date of this amendatory Act.*" *Emphasis supplied.*

413 U.S. 405, 37 L.Ed.2d 688 (1973). Moreover, where the statutory language and legislative history clearly indicate the purpose of Congress, that purpose must be upheld. *Hudson Distributors, Inc.* v. *Eli Lilly and Company*, 84 S.Ct. 1273, 377 U.S. 386, 12 L.Ed.2d 394 (1964). Clearly, when considered in light of the foregoing holdings of this Court, the Third Circuit's interpretation of the phrase "then vested" not only negates the stated purpose of 48 U.S.C. Section 1612(b) but it also fails to uphold the stated purpose of the statute as set forth in its legislative history. Accordingly, the Third Circuit's interpretation must be rejected.

In support of its conclusion that the phrase "then vested" means "hereafter vested," the Court relies upon the following portion of the legislative history of Section 1612(b):

> The decision as to whether jurisdiction over strictly local causes should be vested in the District Court or the local courts will be made by local law.

130 Cong. Rec. S.10527 (August 10, 1984).

According to the Court, "this portion of the legislative history contemplates that the Virgin Islands Legislature will have to take some action in the future which divests the District Court of jurisdiction over local matters." App. 11a.

This portion of the legislative history obviously deals with those cases "not already vested" by local law in the local court and could not reasonably be deemed to apply to the cases "already vested." Moreover, the phrase must be viewed in the context of the entire paragraph in which it appears and the entire legislative history of Section 1612(b). At the beginning of the paragraph in which it appears, Congress clearly expressed its intention to "eliminate the present situation of *both* the District Court and the local court having jurisdiction over strictly local causes." The next sentence in the paragraph, which also

immediately precedes the provision relied upon by the Court, prohibits the District Court from exercising "jurisdiction over any cause over which local law *has vested* jurisdiction in the local courts" upon the effective date. When viewed in this context, it is clear that the phrase "then vested" must be construed to include "already vested," thereby establishing beyond doubt that the District Court had no jurisdiction over F.E.D. actions since the effective date of the Amendment.

The Third Circuit's reliance on this Section of the statute's legislative history is contrary to this Court's holding in *Richards* v. *United States*, 82 S.Ct. 585, 369 U.S.1., 7 L.Ed.2d 492 (1962). In *Richards*, this Court held that a section of a statute should not be read in isolation from the context of the whole act, and in interpreting legislation, [this] Court must not be guided by a single sentence, but should look to provisions of the whole law and to its object and policy. When viewed in light of this holding, the Third Circuit's interpretation based as it is upon an isolated section of the legislative history is contrary to the holding of this Court and must therefore be rejected.

Moreover, as was stated by then Circuit Judge Anthony M. Kennedy in his dissenting opinion in *Agana Bay Development Company Ltd.* v. *Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976):

> ". . . [t]he Organic Act must be construed to give force and effect to all its provisions and no language should be taken out of context and construed without reference to the whole territorial system established by Congress."

Id. at 959, citing *Carter* v. *Gear* (197 U.S. 348, 25 S.Ct. 491, 49 L.Ed. 787 (1905). It is respectfully submitted that if full force and effect are given to all the statutory and historical language of 48 U.S.C. Section 1612(b), the phrase "then vested" would include the term "already vested."

The Third Circuit's further reliance on *Agana Bay Development Company, Ltd.* v. *Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976) to limit the construction of the phrase "then vested" to mean "hereafter vested" does not preclude inclusion of "already vested" within the meaning of the phrase.

First, *Agana Bay* is not on point regarding the issue of *ex proprio vigore* since it was undisputed in *Agana Bay* that legislation was needed to create the Supreme Court and divest the District Court of Appellate jurisdiction. Second, the issue in *Agana Bay* was not the meaning of the phrase "has not been transferred." Thus, any reference in that case to the phrase "has not been transferred" was strictly "*obiter dictum.*" Indeed, there was no analysis of that phrase and its effective date. Third, the Court did not consider the inclusion of the term "already vested" in the statutory construction of the phrase. Thus, the Third Circuit's reliance on *Agana Bay* is misplaced.

Moreover, the Third Circuit has admitted that Congress drafted the divestiture provision in a way that could suggest that the divestiture was immediate and, that both the Guam and Virgin Islands' provisions contain grammatical inferences which could be construed to mean that divestiture was complete upon the effective date of the Amendments. App. 12a.

It is a well-settled rule of statutory construction that the legislature must be presumed to have used words in their known and ordinary significance. *See, Kramer* v. *Government of the V.I.*, 8 V.I. 449, 453 F.2d 1246, 1247 (3rd. Cir. 1971). Moreover, it is an established canon of statutory construction that all the provisions on a subject are to be harmonized and read together so as to effectuate the purposes of the statute. *Port Construction Co.* v. *Government of the V.I.*, 5 V.I., 549, 359 F.2d 663 (3rd Cir. 1966).

Had the Third Circuit given consideration to the inclusion of "already vested" in its construction of the phrase "then vested," it would have discovered that one term is not necessarily exclusive of the other. Indeed, the Court would have realized that Congress intended to immediately divest the District Court of those local causes which had already been vested by local law in the local courts, while at the same time requiring subsequent legislation to divest the District Court of jurisdiction over those local causes which had not yet been vested by local law in the local court. These objectives are not contradictory. We submit that such an interpretation would avoid the need for the re-passing of legislation that is already on the books and would be justice to the intent and policy of Congress to grant more autonomy to the local judiciary. Indeed, the Court should adopt this interpretation because it is in harmony with the declared purpose of Congress to "give a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands." 48 U.S.C. Section 1541 et seq. *See*, also *In Re Petition of the Finance Committee, etc.*, 242 F.2d 902, 903 (3rd Cir. 1957).

Accordingly, Petitioner urges this Court to grant the Writ in order to review that portion of the Third Circuit's decision holding that the phrase "then vested" as used in 48 U.S.C. Section 1612(b), as amended, is limited to cases "hereafter vested" to the exclusion of those "already vested."

III. THE INCLUSION OF CASES "ALREADY VESTED" IN THE CONSTRUCTION OF SECTION 1612(b), AS AMENDED, WOULD NOT THROW CIVIL ACTIONS IN THE DISTRICT COURT INTO "CONFUSION."

According to the Third Circuit, "if we were to accept the Territorial Court's construction of Section 1612(b), as amended, at this late date, we would throw into confusion hundreds or even thousands of civil actions that

the District Court has processed the last six years." App. 14. While Petitioner is appreciative of the Third Circuit's concern for the status of the District Court and its cases, its fear is unfounded.

It is respectfully submitted that there is no basis for such a conclusion, which appears to be based on mere speculation instead of emprical evidence. In fact, very few, if any, cases would be affected if the Petitioner's contention is accepted.

On September 9, 1976 Act No. 3876, codified at 4 V.I. Section 71, *et seq.*, created the Territorial Court to replace the former Municipal Court in the Virgin Islands. In so doing, the Act, which became effective January 1, 1977, increased the civil jurisdiction to $200,000, instead of the former $50,000. Ever since the Territorial Court was created, it has been the policy of the District Court to decline entertaining those civil cases in which the amount in controversy was $200,000 or less, except for judicial economy.

This was the policy adopted by both former Chief Judges of the District Court, Honorable Almeric Christian and the late Honorable David O'Brien. In enforcing the policy, the Clerk of the District Court was required to maintain on each civil file a listing of the amount stated in the *ad damnum* clause of all complaints, and subject to the aforesaid exceptions, all cases demanding judgment of $200,000 or less were transferred to the Territorial Court for disposition.

In addition, on June 20, 1986 the Virgin Islands Legislature enacted Act No. 5176 which prohibited the pleading of a specific sum in the *ad damnum* clause of a civil complaint. 5 V.I.C. Section 5. However, the complaint was required to contain a statement that the "damages are within the jurisdictional limits of the Court to which the pleading is addressed." This certification by the attorney that the complaint was within the jurisdiction of

the District Court creates at least a rebuttable presumption that the 1984 Amendment was being complied with. Thus, with the District Court being divested of jurisdiction over civil cases of $200,000 or less in 1984, the certification leads to the reasonable inference that the damages sought exceeded $200,000 thereby eliminating any major concern about subject matter jurisdiction. With the enactment of this legislation, the District Court ceased keeping a record of civil filings based on the amount in controversy since it was no longer stated in the complaint. However, both judges continued to make a determination at pretrial conferences if the amount in controversy was $200,000 or less and if so, to transfer those cases to the Territorial Court. Very few cases were transferred because very few, if any, civil cases seeking less than $200,000 were filed in the District Court. Thus, a decision by the Third Circuit to include the term "already vested" in the construction of the phrase "then vested" would have little or no effect on the workload of the District Court, [6] until October 1, 1991 when its workload will be reduced because of the increased jurisdiction in the Territorial Court beyond the $200,000 limit.

In light of the foregoing, no "confusion" would result regarding the civil cases of the District Court. Given the District Court's policy and the statement of jurisdictional limitation required by 5 V.I.C. Section 5, the

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[6] A preliminary review by the Chief Deputy Clerk of the District Court revealed the following manageable case-load statistics:

ST. THOMAS	CY87	CY88	CY89	CY90
Civil Filed:	474	420	365	422
Civil Closed:	448	653	318	469
Civil Trials:	13	9	11	41

* * * *

ST. CROIX	CY87	CY88	CY89	CY90
Civil Filed:	355	407	272	332
Civil Closed:	312	354	216	194
Civil Trials:	25	16	6	19

* * * *

conclusion is inescapable that very few cases, if any, which fell within the jurisdiction of the Territorial Court were filed in the District Court since January 1, 1977 when the $200,000 jurisdiction was vested in the Territorial Court. 4 V.I.C. Section 76(a). Since the Organic Act Amendment in issue was enacted in 1984, subsequent to January 7, 1977, the statement by the Third Circuit that "hundreds or even thousands" of civil cases would be thrown into confusion is mere speculation and cannot be substantiated by statistics.[7] Moreover, the record is devoid of any factual basis for this alarming statement which obviously served as the basis for the Third Circuit's erroneous interpretation of 48 U.S.C. Section 1612(b), as amended.

Moreover, the issue presented is not the District Court's jurisdiction over civil actions in which the amount in controversy is less than $200,000, but, rather, its jurisdiction over F.E.D. actions, particularly the case at bar. Pursuant to 28 V.I.C. Section 782(b), the Territorial Court has been and continues to be vested with jurisdiction over *all* F.E.D. actions regardless of the amount in controversy or the value of the property. Thus, Act No. 5594, the post amendment legislation increasing civil jurisdiction effective October 1, 1991, provides no increase in jurisdiction with respect to F.E.D. cases. This suggests that the District Court was divested of F.E.D. jurisdiction upon the effective date of the 1984 Amendments. It further suggests that, given the practice in the District Court and existing law, F.E.D. filings in the District Court represent the rare exception rather than the rule. Hence, there could be no "confu-

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[7] The Third Circuit's statement that "no one in the Virgin Islands has read the 1984 Amendment as immediately divesting the District Court of jurisdiction over local actions before now," App. 14a, erroneously implies that this issue had been raised before. In fact, this is an issue of first impression, deserving of the granting of the Writ of Certiorari.

sion" about F.E.D. cases in the District Court if Petitioner's interpretation is accepted.

When viewed in light of the foregoing, it is clear that the Third Circuit's concern about the "confusion" that would result from accepting Petitioner's contention was more imagined than real and the Writ should be granted to allow consideration of this jurisdictional issue which is so significant to the Virgin Islands Judiciary.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ and reverse the decision below.

Respectfully submitted,

LEON A. KENDALL *
General Counsel
TERRITORIAL COURT OF THE
VIRGIN ISLANDS
Barbel Plaza
Post Office Box 70
St. Thomas, V.I. 00801
(809) 774-6680
Counsel for Petitioner

Date: April 10, 1991

* Counsel of Record

APPENDICES

APPENDIX A

Filed January 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3649 & 3691

ESTATE THOMAS MALL, INC.,
Appellant in No. 90-3691

v.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Appellant in No. 90-3649
Appellant

On Appeal from the District Court
of the Virgin Islands

(D.C. Civil No. 90-00145)

Argued December 5, 1990

BEFORE: HIGGINBOTHAM, *Chief Judge*,
GREENBERG and COWEN, *Circuit Judges*

(Opinion filed January 11, 1991)

John H. Benham, III (Argued)
WATTS & STREIBICH
14 Norre Gade
P.O. Box 11720
Charlotte Amalie, Saint Thomas
USVI, 00801
Attorney for Appellant Estate Thomas Mall, Inc.

Leon A. Kendall (Argued)
Territorial Court of the
Virgin Islands
Office of General Counsel
P.O. Box 70
Charlotte Amalie, Saint Thomas
USVI, 00801

Attorney for Appellant Territorial Court of the Virgin Islands

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

This case arises from a dispute between the Territorial Court of the Virgin Islands (the "Territorial Court") as the tenant under a lease and Estate of Thomas Mall, Inc., ("Estate Thomas") the landlord. Since November 29, 1982, the Territorial Court has leased commercial space from Estate Thomas and its predecessor in title.[1] The Territorial Court uses the space to house a youth program known as the "Rising Stars Youth Steel Orchestra." The Territorial Court created the youth group in 1980 as part of a School Drop-out and Delinquency Prevention Program in order to stem the tide of high school drop-outs who went on to become criminal defendants before the Territorial Court. The Rising Stars Youth Steel Orchestra is a magnet to attract youths into the court's Delinquency Prevention Program.

The Territorial Court's lease with Estate Thomas contains a provision which reads: "Landlord shall sup-

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[1] Originally, the Territorial Court rented the property from Vitraco Park, Inc. In November, 1985, Vitraco Park sold the property to Estate Thomas, who accepted assignment of the lease between Vitraco Park and the Territorial Court.

ply water to the bathrooms." Appellant/Cross-Appellee's App. at 139. The bathrooms have showers, sinks, and toilets. From 1982 when the Territorial Court began leasing the premises until 1985 when Estate Thomas purchased the property, Estate Thomas' predecessor in title supplied the premises with potable water. Soon after it purchased the property, Estate Thomas began supplying well water. This arrangement was satisfactory until July, 1989. For reasons not entirely clear from the record, the water Estate Thomas was pumping from the well became contaminated in 1989. After the water became contaminated, it emitted a foul odor and could not be used even to flush toilets, much less for showers.

After testing the water and determining that it was indeed contaminated, the Territorial Court apprised Estate Thomas of the water's condition. Estate Thomas responded in writing that it was unable to correct the problem. In August 1989, the Territorial Court began witholding rent, contending that Estate Thomas was required by the lease to supply useable water.

On January 24, 1990, Estate Thomas filed Civil Action No. 1990-00019 in the District Court seeking collection for back rent and possession of the premises. The Territorial Court filed a Motion to Dismiss on February 13, 1990. That action and the Territorial Court's Motion to Dismiss are currently pending in the District Court.

On June 14, 1990, while the first action was still pending, Estate Thomas filed this case (Civil Action No. 1990-00145) in the District Court. In this action, Estate Thomas seeks possession of the premises under the summary proceedings provided for by the Virgin Islands Forcible Entry and Detainer ("FED") statute, V.I. Code Ann. tit. 28, § 782 (1976).[2] After conducting the sum-

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[2] Section 782 reads:

(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession

mary FED hearing, the District Court entered its Memorandum Opinion and Final Order.

In its Final Order the District Court denied Estate Thomas' application for the FED relief, on the condition that the Territorial Court pay Estate Thomas all rent due through August, 1990. In addition, the District Court ordered Estate Thomas to supply the premises with potable water by September 17, 1990. In the event that the Territorial Court failed to pay rent by September 14, 1990, Estate Thomas had the right to take possession of the premises on October 1, 1990.

The Territorial Court appeals from this order on the grounds that: (1) the District Court lacks subject matter jurisdiction over FED actions because Congress withdrew concurrent jurisdiction from the District Court over local actions; (2) the FED action was barred as a matter of law because the Territorial Court had three years of quiet possession prior to the FED action; (3) the District Court exceeded its authority in awarding Estate Thomas back rent, since (i) that relief was not requested and (ii) such relief is inappropriate in an FED action; and (4) the District Court erred in not dismissing the FED action after it found that Estate Thomas was in breach of the lease agreement.

For its part, Estate Thomas has cross-appealed, contending that: (1) there was insufficient evidence for the

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is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.

(b) If the unpaid rent or the value of the real property does not exceed $500, exclusive of interest and costs, the Territorial Court shall have exclusive jurisdiction of such action. In all other cases, the Territorial Court and the district court shall have concurrent jurisdiction.

V.I. Code Ann. tit. 28, § 782 (1976), as amended by Act No. 8376, § 5, Sess. L. 197 (1975) (providing that "Territorial Court" should be read wherever the V.I. Code prints "Municipal Court").

District Court to find that Estate Thomas was in breach of the lease by failing to supply the premises with potable water; (2) the District Court erred when it admitted written water test results into evidence; and (3) the District Court erred in failing to award Estate Thomas interest on the rent due.

We have jurisdiction to hear this appeal under 28 U.S.C. § 1291. Although we conclude that Congress did not withdraw subject matter jurisdiction from the District Court to hear FED actions, we nevertheless reverse the District Court because Estate Thomas has failed to state a cause of action that is cognizable in forcible entry and detainer. Our decision is based on the conclusion that the Territorial Court is occupying the premises pursuant to a facially bona fide and good faith claim of right. We will therefore remand this case to the District Court with instructions to dismiss.

I.

In 1984, Congress passed an amendment to the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1541, *et. seq.* (1954). The 1984 amendment, P.L. 98-454, eliminates concurrent jurisdiction in the District Court when jurisdiction is vested in the local courts of the Virgin Islands. The amendment has been codified at 48 U.S.C. § 1612(b) and reads in relevant part:

> In addition to the jurisdiction described in subsection (a) of this section [essentially federal question jurisdiction] the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands.

28 U.S.C. § 1612(b) (1987). The threshold question on this appeal is the meaning of the language "not then vested by local law in the local courts." The Territorial Court argues that this language means "not *already*

vested," while Estate Thomas argues that it means "not *hereafter* vested." We must first resolve this question before we can address the other issues raised by this appeal.

The Territorial Court argues that the language "not then vested by local law in the local courts" eliminates jurisdiction over civil actions where the amount in controversy is between $500 and $200,000. Under this argument, jurisdiction in the District Court would be eliminated because V.I. Code Ann. tit. 4, § 76(a) (Supp. 1987) grants the Territorial Court "[o]riginal jurisdiction concurrent with the District Court of all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $200,000." *Id.* Since 28 U.S.C. § 1612(b) limits the general jurisdiction of the District Court to "all causes . . . the jurisdiction over which is not then vested by local law in the local courts," and V.I. Code Ann. tit. 4, § 76(a) vests jurisdiction over civil actions in a local court, the Territorial Court concludes that the District Court lacks jurisdiction over civil actions within the specified range of the amount in controversy.

In addition to eliminating jurisdiction over civil actions where the amount in controversy is between $500 and $200,000, the Territorial Court also asserts that the 1984 amendment to the Revised Organic Act eliminated jurisdiction over FED actions. The argument here is the same as before. The Territorial Court urges that because V.I. Code Ann. tit. 28, § 782 (1976) vests jurisdiction over FED actions in the Territorial Court of the Virgin Islands,[3] jurisdiction over FED actions is vested in a local court. Since 28 U.S.C. § 1612(b) limits the general jurisdiction of the District Court to "all causes . . . the jurisdiction over which is not then vested by local law in the local courts," and V.I. Code Ann. tit.

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[3] *See* footnote 2, *supra* for the text of section 782.

28, § 782 vests jurisdiction over FED actions in a local court, the Territorial Court concludes that the District Court lacks jurisdiction over FED actions.

Lest we be swayed by the fact that the Virgin Islands statutory provisions purport to grant jurisdiction in the District Court, the Territorial Court points out correctly that the Virgin Islands legislature has no power to do that. Only Congress has the power to determine the jurisdiction of the District Court of the Virgin Islands under Article IV of the United States Constitution. Accordingly, we must look only to the language of the Revised Organic Act to determine the scope of the District Court's jurisdiction.

In support of its argument that 28 U.S.C. § 1612(b) eliminates the District Court's concurrent jurisdiction over civil actions generally and FED actions in particular, the Territorial Court points to the "plain language" of section 1612. Section 1612(b) states that there shall be no jurisdiction over actions "the jurisdiction over which is not then vested by local law in the local courts . . . ." Apparently, the Territorial Court would have us read "not then vested" as "not already vested" because according to the Territorial Court, that is what section 1612(b) plainly says.

To bolster the interpretation of section 1612(b) that "not then vested" means "not already vested," the Territorial Court points to section 1612(b)'s legislative history. In its discussion of P.L. 98-454, the Senate stated:

> The purpose of section 22(b) [section 1612(b) as codified] is to eliminate the present situation of both the District Court and the local court having jurisdiction over strictly local causes. *Upon the effective date* the District Court will not [sic] longer have jurisdiction over any cause over which local law has vested jurisdiction in the local courts . . . .

130 Cong. Rec. S. 10527 (August 10, 1984) (emphasis added). The Territorial Court interprets "upon the effective date" to mean "on the effective date *hereof*" and urges that this language supports the conclusion that section 1613(b) meant to say "not already vested" when it actually reads "not then vested." An alternative construction of "upon the effective date" is that it means "upon the effective date of an act by the Virgin Islands legislature divesting the District Court of jurisdiction . . . ." In other words, this portion of the legislative history could mean what the Territorial Court contends (namely that section 1612(b) immediately divested the District Court of jurisdiction over local matters generally, and over FED actions in particular, because jurisdiction over those actions was already vested in a local court). On the other hand, it could mean the exact opposite (namely that section 1612(b) does not by its own force divest the District Court of jurisdiction, but gives the Virgin Islands legislature the power to do exactly that when the legislature chooses to exercise power by vesting a local court with jurisdiction). Because the significance of this portion of the legislative history is unclear, we canot rely on it as a basis for resolving the meaning of "not then vested by local law in a local court."

For its part, Estate Thomas contends that § 1612(b) does not eliminate jurisdiction in the District Court over local actions, but gives the Virgin Islands legislature power to vest jurisdiction over local actions exclusively in local courts. In support of this contention, Estate Thomas cites another section of the 1984 amendment to the Revised Organic Act of the Virgin Islands. This section reads in relevant part:

> The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitu-

> tion and the laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612 (a) [federal question jurisdiction] and (c) [criminal jurisdiction] of this title.

28 U.S.C. § 1611(b) (1987). According to Estate Thomas, the language of section 1611(b) that the legislature "may vest" in local courts jurisdiction over any action over which the District Court does not have exclusive jurisdiction must be read together with section 1612(b). "May vest" looks to the future and so necessarily contemplates an act of the Virgin Islands legislature in the future. In other words, Estate Thomas argues that the Virgin Islands legislature has the power to vest jurisdiction over local matters in local courts under section 1611(b), but it need not do that. Under the reading urged by Estate Thomas, the legislature can choose instead to continue the current system of concurrent jurisdiction in the District Court and the Territorial Court over most civil actions.

We do not agree with Estate Thomas' construction of section 1611(b). We read that section as allowing the Virgin Islands legislature to create territorial jurisdiction for violations of federal law, without divesting the District Court of jurisdiction by operation of section 1612(b). In other words, the Virgin Islands legislature has the power under section 1611(b) to create concurrent federal question jurisdiction in territorial courts. In exercising that power, the legislature will not divest the District Court of jurisdiction under section 1612(b), as it might arguably do if section 1611(b) did not specify that the creation of jurisdiction in local courts over federal questions does not divest the District Court of jurisdiction.

The reason it was necessary to specify that jurisdiction in the District Court would not be destroyed is be-

cause section 1612(b) says that the District Court will not have jurisdiction over actions where jurisdiction is vested by local law in local courts. To avoid an argument that sections 1611(b) and 1612(b) when read together constitute a delegation of power by Congress to the Virgin Islands legislature to create exclusive jurisdiction in Virgin Island courts over questions of federal law, Congress added the last line to section 1611(b) which expressly states the intention of Congress that federal question jurisdiction in local courts, if it exists at all, will be concurrent with federal question jurisdiction in the District Court.

It does not follow from the language of section 1611 that the Virgin Islands legislature is somehow empowered to create exclusive jurisdiction in local courts over local actions by force of the application of section 1611 (b). Section 1611(b) expressly states that "such jurisdiction [i.e. the concurrent jurisdiction of the District Court and the Territorial Court over federal questions where there is no exclusive federal jurisdiction in the district court] shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612(a) [federal question jurisdiction] and (c) [criminal jurisdiction] of this title." We read this last sentence as an acknowledgement that concurrent jurisdiction may exist with respect to federal question jurisdiction and certain criminal actions, but not over local actions which are described in section 1612 (b). The omission of section 1612(b) from the cross reference strongly suggests that Congress did not contemplate District Court concurrent jurisdiction over local actions by operation of section 1611(b), although Congress did contemplate that there would be concurrent jurisdiction over federal questions and certain criminal cases. The question remains whether section 1612(b) divests the District Court of jurisdiction over local actions *ex proprio vigore*, or whether section 1612(b)

contemplates divesture only when the Virgin Islands legislature, after the date of the amendment to the Revised Organic Act, passes a law which vests jurisdiction over local actions in local courts.[4]

In support of the argument that section 1612(b) does not divest the District Court of jurisdiction *ex proprio vigore*, in other words, without the Virgin Islands legislature acting sometime after the effective date of section 1612(b), Estate Thomas points to a different section of the legislative history of P.L. 98-454. In referring to section 22(b) [section 1612(b)], the Senate stated:

> The decision as to whether jurisdiction over strictly local causes should be vested in the district court or the local courts will be made by local law.

130 Cong. Rec. S. 10527 (August 10, 1984). This portion of the legislative history contemplates that the Virgin Islands legislature will have to take some action in the future which divests the District Court of jurisdiction over local matters. As such, it provides strong support for Estate Thomas' contention that the language of section 1612(b) means "vested in local courts after the date of the amendment to the Revised Organic Act." "Not then vested" would mean "not hereafter vested" and so section 1612(b) would not *ex propio vigore* divest the District Court of jurisdiction over local actions.

We are persuaded that this latter argument of Estate Thomas is correct. There is nothing in the language

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[4] "*Ex propio vigore*" means "by its own force." Black's Law Dictionary 522 (5th ed. 1979). It refers to the general principle that some constitutional principles are self-executing. Provisions that are not self-executing require legislation to effectuate their purposes. *See generally Groves v. Slaughter*, 40 U.S. 449 (1841). It is not disputed in this case that the Revised Organic Act of the Virgin Islands, as amended, has the statute of a "Constitution" under Article IV of the United States Constitution. *See* U.S. Const. art. IV, § 3. We therefore must confront the question whether section 1612(b) is self-executing or requires legislation to enact its purposes.

of section 1612(b) that suggests that Congress intended to divest the District Court of jurisdiction over local actions immediately. Surely Congress would have specified that the divesture of jurisdiction was to be immediate if that is what it intended.

Our construction of section 1612(b) is consistent with the view that the Court of Appeals for the Ninth Circuit took when it decided *Agna Bay Develop. Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976). With respect to the Organic Act of Guam, § 22 in former 48 U.S.C.A. § 1424, Congress made a similar provision for divesture of the District Court of Guam where the local legislature vested jurisdiction in a local court.[5] Former section 22 read in relevant part:

> The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, *jurisdiction over which has not been transferred by the legislature to other court or courts established by it. . . .*

Organic Act of Guam, § 22, 48 U.S.C.A. § 1424 (1976) (emphasis added). As in section 1612(b), Congress drafted the divesture provision in a way that could suggest that the divestiture was immediate. Both the former section 22 of the Organic Act of Guam and section 1612(b) contain grammatical inferences which could be construed to mean that divesture was complete upon the enactment of the statute by Congress.

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[5] Former 48 U.S.C. § 1424 (quoted above) was amended in 1978 and again in 1984. The current version of 48 U.S.C. § 1424 (1987) mirrors the language of 48 U.S.C. § 1612. No cases have been decided which construe section 1424, as amended.

Former section 22 of the Organic Act of Guam used the past perfect "has not been transferred" in a way that could suggest "has not already been transferred" just as section 1612(b) inserts the adverb "then" in the phrase "not then vested by local law in local courts" in a way that could be read "not already vested . . . in local courts."

Notwithstanding the fact that former section 22 of the Organic Act of Guam could have been read as having immediately divested the District Court of Guam of jurisdiction over local actions, the Court of Appeals for the Ninth Circuit assumed in *Agna Bay* that the Organic Act did not *ex proprio vigore* divest the District Court of jurisdiction over local matters. Rather, that court assumed that an act of the Guam legislature would be required to divest the District Court of Guam of jurisdiction over local actions. The *Agna Bay* court wrote:

> [A]s to local, non-federal cases, [section 22 of the Organic Act of Guam, 48 U.S.C.A. § 1424] gave the district court original jurisdiction in all 'other causes' *until* the Guam legislature provides otherwise under the power created in the first sentence [of section 22].

Agna Bay, 529 F.2d at 955-56 (emphasis added). We are convinced that we should read section 1612(b) in the same way. Accordingly, we now hold that section 1612(b) does not *ex proprio vigore* divest the District Court of jurisdiction over local matters. Such divestment will not occur until the Virgin Islands legislature enacts a law which effects the power created by the 1984 amendments.[6]

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[6] On August 29, 1990, the Virgin Islands legislature took this action. Local Law No. 5594 amended V.I. Code Ann. tit. 4, § 76 (Supp. 1987) to vest in the Territorial Court jurisdiction over all civil actions regardless of the amount in controversy, effective October 1, 1991. In accordance with out ruling today, this act will divest the District Court of jurisdiction over such actions as of October 1, 1991.

We are not alone in reading section 1612(b) as requiring an act of the Virgin Islands legislature to complete the divesture of jurisdiction in the District Court over local actions. Counsel for both the Territorial Court and Estate Thomas indicated at oral argument that no one in the Virgin Islands has read the 1984 amendment to the Revised Organic Act as immediately divesting the District Court of jurisdiction over local actions before now. Indeed, the District Court has been exercising jurisdiction over civil actions where concurrent jurisdiction is vested by Virgin Islands law in the Territorial Court for the last six years. If we were to accept the Territorial Court's construction of section 1612(b) at this late date, we would throw into confusion hundreds or even thousands of civil actions that the District Court has processed over the last six years. Having resolved the vexatious question of the District Court's jurisdiction, we proceed to the merits.

II.

FED complaints are summary actions to determine rights of peaceable possession of real property. They are a peaceful alternative to the often violent exercise of a property owner's right of self-help. *See C.M.L., Inc. v. Dunagan*, 904 F.2d 189, 190 (3d Cir. 1990). In *Dunagan*, we explained that:

> In exchange for revoking their right to repossession by force, the statute provides a simple summary proceeding, with time requirements substantially shorter than those provided in ordinary civil actions and with the issues sharply restricted.

Id. But speedy adjudication of the issue of peaceable possession comes at a price. The price is that the scope of an FED proceeding is very limited.

> Unless the statute is to the contrary, the jurisdiction of the Court in FED cases is confined to determining

> the issue of peaceable possession and does not extend to (a) an adjudication of title or (b) the right to possession; nor can the justice adjudicate a right of possession that depends on an equitable interest in the premises [ ] or inquire into equitable rights and give relief to which the party might be entitled in equity.

Inter Car Corp. v. Discount Car Rental, 21 V.I. 157, 159 (Terr. Ct. 1984). As soon as a defendant in possession in an FED action raises a colorable defense requiring construction of an agreement between the property owner and the party in possession, an FED action will not lie. *See, e.g., Iron Mountain & H.R. Co. v. Johnson*, 119 U.S. 608, 612 (1887).

In particular, we have held that an FED action is unavailable where the defendant in possession occupies the property under claim of right. *Dunagan*, 904 F.2d at 191 (quoting *Inter Car*, 21 V.I. at 159) ("Where a tenant is retaining possession by force, relief is available in a summary FED proceeding only if there 'is an *undisputed* oral or written lease agreement, and rent is due and owing thereon; or [t]here is an *undisputed* oral or written lease which has expired.' ") (emphasis added). In this case, there is a lease between the parties, the meaning of which is in dispute. In short, the Territorial Court occupies the premises under a claim of right.

While we express no opinion as to the merits of the underlying dispute, it should have been apparent to the District Court that resolution of Estate Thomas' action requires construction of the parties' lease agreement. For instance, the Court would need to construe the lease provision where Estate Thomas agrees to provide water to the bathrooms, determine whether the Territorial Court exceeded its remedies under the lease by withholding rent until Estate Thomas provides useable water, and decide whether the parties have a valid lease at all. While these

may not be the precise issues that will be litigated in an action for rent and ejectment, they are the kind of issues that are appropriately resolved in an ordinary civil action, not the summary FED proceeding.

III.

In conclusion, the 1984 amendments to the Revised Organic Statute did not *ex proprio vigore* divest the District Court of subject matter jurisdiction over local actions generally and FED actions in particular. The District Court had jurisdiction to hear this FED case. The dispute in this case concerns the right and remedies of the Territorial Court and Estate Thomas under their lease. The Territorial Court has come forward with facially good faith and bona fide rights under a lease which, upon trial with plenary review, may defeat the claim of Estate Thomas. As such this controversy is not an appropriate subject for an FED action.

The judgment of the District Court will be reversed and the case is remanded to the District Court with instructions to dismiss the complaint and return all checks or monies held in escrow.[7]

Costs taxed against Estate Thomas Mall in both appeals.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[7] By reason of our determination that, although the District Court had jurisdiction, Estate Thomas was nevertheless not entitled to relief in forcible entry and detainer, we need not resolve the other issues raised on this appeal and cross-appeal.

APPENDIX B

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 1990-145

ESTATE THOMAS MALL, INC.,
Plaintiff,

v.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Defendant.

John H. Benham, Esquire
WATTS & STREIBICH
14A Norre Gade
P.O. Box 11720
St. Thomas, VI 00801
Attorney for Plaintiff

Leon Kendall, Esquire
Office of General Counsel
Territorial Court of the Virgin Islands
P.O. Box 70
St. Thomas, VI 00801
Attorney for Defendant

JOSEPH J. FARNAN, JR.
United States District Judge
Sitting by Designation

MEMORANDUM OPINION

This is an action for Forcible Entry and Detainer filed on June 14, 1990, by plaintiff, Estate Thomas Mall, Inc. ("Estate Thomas") against the Territorial Court of the Virgin Islands ("Territorial Court").[1] This action arises out of a landlord tenant relationship in which Estate Thomas seeks to recover possession of a rental unit located on St. Thomas at "Vitraco Park."

The Territorial court has filed a motion to dismiss contending (1) this Court lacks jurisdiction over the subject matter; (2) the action is barred by two exemptions to the Virgin Islands' Forcible Entry and Detainer Statute; (3) the plaintiff is estopped from bringing this action because the relief sought in this action is the subject of a pending action before this Court between the same parties; and (4) service of process was insufficient under 28 V.I.C. § 785.

As required by the Virgin Islands Code, Title 28, Section 785, the Court held a hearing on July 13, 1990, to allow defendant to show cause why a judgment of dispossession should not be entered and to hear argument on defendant's motion to dismiss. At the hearing, each party presented evidence in support of their respective positions.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

In 1982, the Territorial Court leased the premises in dispute from the then owner, Vitraco Park, Inc. ("Vitraco"). The Territorial Court converted the leased premises into the headquarters for a School Drop-Out and

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[1] Estate Thomas Mall, Inc. filed an action for breach of contract, declaratory judgment and to recover possession of real property on January 24, 1990 (Civil Action No. 1990-19) which is still pending before the Court.

Delinquency Prevention Program to aid the territory's children. The focal point of the Territorial Court sponsored program was the formation and continued support of a youth steel orchestra named the Rising Stars Steel Band. The Rising Stars used the premises for rehearsals and other activities associated with the band.

On November 21, 1985, Estate Thomas purchased the premises and became the Territorial Court's landlord by accepting assignment of the lease that had existed between Vitraco and the Territorial Court. Since that time there has been one lease extension by agreement of the parties and one option to renew exercised by the Territorial Court.

During the course of its relationship with the Territorial Court, Vitraco had provided potable water for the bathrooms at the unit that were used by the band members. When Estate Thomas became the landlord in 1905, it discontinued providing potable water and it was that act that has led to the ongoing dispute between Estate Thomas and the Territorial Court with regard to the leased premises. As a result of Estate Thomas ceasing to supply potable water to the bathrooms of the leased unit, the Territorial Court began to withhold its $3,000 per month rent in August of 1989. Since August of 1989, the Territorial Court has continued to withhold its monthly rent in an effort to force Estate Thomas to supply potable water.

The Territorial Court has not placed the withheld trusts in escrow, although on December 5, 1989, it did offer to have Estate Thomas' counsel hold the rents in escrow pending resolution of the water dispute. Estate Thomas, however, would not agree to the procedure. During the period it has withheld rent, the Territorial Court has not purchased any potable water for use in the bathrooms or undertaken any other reasonable self-help remedies.

Prior to withholding its rent, the Territorial Court did give written and oral notice of its contention that Estate Thomas was responsible to provide potable water to the unit.[2]

The lease between the parties dated November 29, 1982, provides in *Paragraph 5—Utilities* that the "landlord shall supply water to the bathrooms." [3]

Further, in *Paragraph 16—Default*, the lease provides:

> In the event of any breach of any of the covenants and agreements on the part of Landlord to be performed and not corrected within ten (10) days after notice thereon by Tenant to Landlord, then Tenant may at its option correct the breach at its own expense and deduct the total thereof from any rents due or to become due.

On May 16, 1990, and May 29, 1990, Estate Thomas hand-delivered Notices of Default and to Quit to the Territorial Court citing the non-payment of rent.

CONCLUSIONS OF LAW

1. *Defendant's Motion to Dismiss*

a. Subject Matter Jurisdiction.

The Court concludes that it has jurisdiction over Forcible Entry and Detainer actions pursuant to 28 V.I. § 782(b).

b. Legal Bar to Action.

The Court concludes that 28 V.I.C. § 793 is not a bar to this action. Section 793 requires that possession must

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[2] See July 5, 1989 letter from Leon Kendall, General Counsel for the Territorial Court, to Drew Johnson, Estate Thomas' representative.

[3] At the conclusion of the hearing on July 13, 1990, the Court instructed the parties to submit estimates of the cost of supplying potable water to the leased premises.

be "three years' quiet possession of the premises immediately proceeding the commencement of such action". Since the Territorial Court's possession of the leased premises has been disputed since at least August 1989, as demonstrated by the Territorial Court's own evidence, the Court concludes that quiet and continuous possession has not been established.

c. Estoppel.

The Court concludes that plaintiff is not estopped from commencing this action because of the pendency of Civil Action No. 1990-19, since the actions are distinguishable by their nature and the principal relief sought.

The Court of Appeals for the Third Circuit in discussing the principles and remedies to be utilized by district courts when it appears two possibly duplicative actions are pending on its docket stated:

> . . . the district court carefully insures that the plaintiff does not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed. 563 F.2d 60.

The Court concludes that the two actions at issue are not substantially identical.

Civil Action 1990-19 contains four counts and is principally a breach of contract suit for recovery of rent. As further relief, it also seeks a declaration of the respective rights of the parties under their written lease agreement. In its final count (Count IV), plaintiffs seek possession of the property as an adjunct to their anticipated success on all other counts of the lawsuit.

Civil Action 1990-145 is a summary action for possession only premised on the alleged failure of defendant to pay rents when due for almost one year.

The Court concludes that plaintiff's bringing the second action did not enhance its procedural rights, except as those rights may pertain to a timely disposition of litigation by the Court.

d. Sufficiency of Service of Process.

The Court concludes that service of process in this action was sufficient and in compliance with 28 V.I.C. § 785.

Title 28, V.I.C., § 785 provides that upon filing a complaint, a summons shall be served and returned within 3 days. The record demonstrates that plaintiff fully complied with its obligations to obtain timely service on defendant, and the time gap that did occur in this action did not prejudice defendant.

2. *Substantive Issues*

a. The Landlord's Obligation.

The Court concludes that Paragraph 5 of the November 29, 1982 lease between the parties and the course of conduct between Vitraco and the Territorial Court in carrying out the terms of the lease require that the landlord, Estate Thomas, provide potable water for use in the bathrooms. Therefore, the Court concludes that plaintiff defaulted on its obligations under the lease.

b. The Tenant's Remedies.

The Court concludes that Paragraph 16 of the November 29, 1982 lease between the parties allows defendant to cure defaults by plaintiff by deducting the cost of correcting the breach from its rent. Therefore, the Court concludes defendant was entitled to apply its rent, after notice of the default to plaintiff, to compensate for the reasonable cost of supplying potable water to the leased premises for use in the bathrooms.

The Court further concludes that defendant's withholding of the full rent each month ($3,000) has exceeded its remedies under the lease.[4]

c. Defendant's Showing of Cause in Response to Allegation of Unlawful Holding by Force.

The Court concludes that although the Territorial Court withheld an amount in excess of what is reasonable to cure Estate Thomas' default, it is entitled to remain in possession of the premises under the terms of the parties' lease. In that regard, if Estate Thomas does not supply reasonable amounts of potable water, the Territorial Court shall deduct the reasonable costs of supplying potable water from its monthly rent.

With regard to the rent that the Territorial Court has withheld since August 1989, the Court concludes Estate Thomas is entitled to receive the entire withheld amount, since the Territorial Court did not incur any expenses in supplying water itself.

An appropriate Order has been entered.

DATED this 5th day of September, 1990.

/s/ Joseph J. Farnan Jr.
United States District Judge
Sitting by Designation

---

[4] The defendant has contended that pursuant to statute it was permitted the remedy of rent withholding and not regulated to exercise its self-help remedy under Paragraph 16. Even if plaintiff is correct with regard to its right to withhold, the Court concludes that defendant's failure to maintain an appropriate escrow arrangement as required when a withholding is undertaken has resulted in defendant's efforts having no legal effect with regard to plaintiff's present claims.

APPENDIX C

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 1990-145

ESTATE THOMAS MALL, INC.,
Plaintiff,

v.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Defendants.

FINAL ORDER

WHEREAS, in accordance with the Court's Findings of Fact and Conclusions of Law to be filed on September 4, 1990,

IT IS HEREBY ORDERED this 31st day of August, 1990, that:

1. Defendant's Motion to Dismiss is denied.

2. Plaintiff's application for Forcible Entry and Possession of the leased premises is denied on the condition that defendant pay all rent due through August 1990 ($36,000.00) to plaintiff no later than September 14, 1990. If defendant fails to pay plaintiff the amount due by said date, plaintiff may take possession of said leased premises on October 1, 1990.

3. Effective September 17, 1990, plaintiff shall supply to defendant in a manner determined by plaintiff, potable water at the leased premises. Said supply shall be

in amounts sufficient to meet defendant's reasonable requirements. If the parties cannot agree on the manner and amount of water to be supplied, they shall advise the Court of their respective positions no later than September 10, 1990.

/s/ Joseph J. Farnan Jr.
United States District Judge
Sitting by Designation

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3649 & 90-3691

ESTATE THOMAS MALL, INC.,
Appellant in No. 90-3691

vs.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Appellant in No. 90-3649

(D.C. Civil No. 90-00145)
On Appeal from the United States District Court
of the Virgin Islands
(Division of St. Thomas and St. John)

Present: HIGGINBOTHAM, *Chief Judge*, GREENBERG and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court of the Virgin Islands, Division of St. Thomas and St. John and was argued by counsel December 5, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 6, 1990, be, and the same is hereby reversed and the cause is remanded to

the said District Court with instruction to dismiss the complaint and return all checks or monies held in escrow. Costs taxed against Estate Thomas Mall in both appeals. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

January 11, 1991

Certified as a true copy and issued in lieu of a formal mandate on March 4, 1991.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit

APPENDIX E

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, Section 3, Clause 2 of the Constitution of the United States provides, in part, that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

Section 22 of the Revised Organic Act of 1954, 48 U.S.C. Section 1612, provides, in pertinent part:

> JURISDICTION OF DISTRICT COURT
>
> * * * *
>
> "(b) In addition to the jurisdiction described in subsection (a) the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands . . ."

Section 76 of Title 4 of the Virgin Islands Code, provides, in pertinent part:

> CONCURRENT JURISDICTION
>
> "(a) The territorial court shall have original jurisdiction concurrent with that of the district court in all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $200,000 . . ."

Section 782 of Title 28 of the Virgin Islands Code, provides:

> ACTION FOR FORCIBLE ENTRY OR DETAINER
>
> "(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession is held by force, the person en-

titled to the premises may maintain an action to recover the possession thereof.

(b) if the unpaid rent or the value of the real property involved does not exceed $500, exclusive of interest and costs, the municipal court shall have exclusive jurisdiction of such action. In all other cases, the municipal court and the district court shall have concurrent jurisdiction."

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

(2)

No. 90-1564

In The

Supreme Court of the United States

October Term, 1990

TERRITORIAL COURT OF THE VIRGIN ISLANDS,

Petitioner,

v.

ESTATE THOMAS MALL, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN H. BENHAM
WATTS & STREIBICH
14A Norre Gade
P.O. Box 11720
St. Thomas, U.S. Virgin Islands
00801
Tel: (809) 774-0673
Fax: (809) 776-3630
Counsel for Respondent

Of counsel:
CARL J. HARTMANN
201 East 28th Street
Suite 15-B
New York, N.Y. 10016
Tel: (212) 725-6327

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether the Court should issue a writ of certiorari to review an issue which presents no important federal question and on which the Petitioner failed to develop a record in the lower courts?

Whether the Court should issue a writ of certiorari to review a decision wherein the Petitioner attained complete relief from the United States Third Circuit Court of Appeals?

PARTIES TO THE PROCEEDING

Respondent Estate Thomas Mall, Inc. is a United States Virgin Islands corporation. Respondent owns a shopping plaza known as Vitraco Park in Charlotte Amalie, St. Thomas, United States Virgin Islands and rents commercial space at that location. One of the tenants was the Petitioner Territorial Court of the Virgin Islands pursuant to a lease entered into with the prior owner of Vitraco Park.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THIS ACTION DOES NOT PRESENT ANY IMPORTANT ISSUE REQUIRING RESOLUTION BY THIS COURT 8

A. The decision of the Third Circuit is not in conflict with any decision of another United States court of appeals, nor does it conflict with a state or territorial court of last resort 11

B. There is no important question of federal law which should be settled by this court 12

C. This Court should not grant review to a prevailing party 13

II. THE THIRD CIRCUIT CORRECTLY HELD THAT ACTION BY THE VIRGIN ISLANDS LEGISLATURE IS REQUIRED TO DIVEST THE DISTRICT COURT OF THE VIRGIN ISLANDS OF CONCURRENT JURISDICTION OVER LOCAL CAUSES OF ACTION 14

CONCLUSION 17

TABLE OF CONTENTS – Continued

Page

APPENDICES

1. *Government of the Virgin Islands v. Bryan*, Criminal No. 1989-129, Dist. Ct. of the Virgin Islands, Div. of St. Croix, Memorandum Opinion January 29, 1990..... App. 1

2. Letter, June 13, 1991 – Leon A. Kendall to John H. Benham.....App. 12

TABLE OF AUTHORITIES

Page

CASES:

Agana Bay Develop, Co. (Hong Kong) Ltd. v. Supreme Court of Guam, 529 F.2d 952 (9th Cir. 1976) 12

Government of the Virgin Islands v. Bryan, Criminal No. 1989-129 (D.V.I., Div. of St. Croix, January 29, 1990) 10, 11, 12

Public Service Commission v. Brashear Freight Lines, Inc., 306 U.S. 204 (1938) 14

STATUTES:

United States Code & Statutes at Large

Ch. 699, § 25, 49 Stat. 1813 (1936) 15

Ch. 558, § 22, 68 Stat. 506 (1954) 15

Ch. 558, § 23, 68 Stat. 506 (1954) 15

48 U.S.C. § 1612(b) 16

Virgin Islands Code & Session Laws

Title 28, §§ 781 et seq. 6

1976 V.I. Sess. Laws No. 3876 ..... 15, 16

1981 V.I. Sess. Laws No. 4647 ..... 10, 16

1990 V.I. Sess. Laws No. 5594 13

Legislative Materials

130 Cong. Rec. S. 10527 (August 10, 1984) 17

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

Estate Thomas Mall, Inc. v. Territorial Court of the Virgin Islands, 923 F.2d 258 (3d Cir. 1991), *reh'g denied* ___ F.2d ___ (1991).

Estate Thomas Mall, Inc. v. Territorial Court of the Virgin Islands, Civil No. 1990-145, District Court of the Virgin Islands, Division of St. Thomas & St. John, Order entered August 31, 1990, Memorandum Opinion issued September 5, 1990.

JURISDICTIONAL STATEMENT

The Territorial Court of the Virgin Islands (hereinafter "Territorial Court" or "Petitioner") asserts that this Court should exercise its discretionary jurisdiction to issue a writ of certiorari to the Third Circuit Court of Appeals. 28 U.S.C. § 1254 (1). Estate Thomas Mall, Inc. (hereinafter "Estate Thomas Mall" or "Respondent") opposes the grant of a writ of certiorari upon the grounds stated in the argument portion of this brief in opposition.

STATUTES INVOLVED

48 U.S.C. § 1611:

(a) District Court of the Virgin Islands; local courts

The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

(b) Jurisdiction

The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612 (a) and (c) of this title.

48 U.S.C. § 1612:

(a) Jurisdiction

The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the ancillary laws relating to the income tax enacted by the legislature of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which could constitute a criminal offense described in chapter 75 of subtitle F of Title 26 shall constitute an offense against the government of the Virgin Islands and may be prosecuted by the appropriate officers thereof in the District Court of the Virgin Islands without the request or the consent of the United States attorney for the Virgin

Islands, notwithstanding the provisions of 1617 of this title.

(b) General jurisdiction; limitations

In addition to the jurisdiction described in subsection (a) of this section the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands: *Provided,* That the jurisdiction of the District Court of the Virgin Islands under this subsection shall not extend to civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs; to criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both; and to violations of local police and executive regulations. The courts established by local law shall have jurisdiction over the civil actions, criminal cases, and violations set forth in the preceding proviso. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by local law for the purposes of determining the availability of indictment by grand jury or trial by jury.

4 V.I.C. § 32: Original jurisdiction

(a) Under section 22 of the Revised Organic Act, approved July 22, 1954, the district court has the original jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the

matter in controversy, and has general original jurisdiction in all other causes in the Virgin Islands, where exclusive jurisdiction is not conferred upon the territorial court, as the inferior court of the Territory, by section 23 of the Revised Organic Act. When it is in the interest of justice to do so the district court may on motion of any party transfer to the district court any action or proceeding brought in the territorial court, and the district court shall have jurisdiction to hear and determine such action or proceeding.

4 V.I.C. § 75: Exclusive jurisdiction

The territorial court shall have original, exclusive jurisdiction –

(1) of all civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs;

(2) of all criminal cases wherein the maximum punishment that may be imposed does not exceed a fine of $100 or imprisonment of six (6) months, or both;

(3) of all violations of police and executive regulations, unless otherwise provided by law; and

(4) where otherwise provided by law.

4 V.I.C. § 76: Concurrent jurisdiction

(a) The territorial court shall have original jurisdiction concurrent with that of the district court in all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $200,000; to supervise and administer estates and fiduciary relations; to appoint and supervise guardians and trustees; to hear

and determine juvenile, divorce, annulment and separation proceedings; to grant adoptions and changes of name; to establish paternity; to legitimize children and to make orders and decrees pertaining to the support of relations.

28 V.I.C. § 782: Action for forcible entry and detainer

(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.

(b) If the unpaid rent or the value of the real property involved does not exceed $500, exclusive of interest and costs, the municipal court shall have exclusive jurisdiction of such action. In all other cases, the municipal court and the district court shall have concurrent jurisdiction.

1976 V.I. Sess. Laws No. 3876

§ 5: Wherever the name "Municipal Court" or "Municipal Court of the Virgin Islands" appears in the Virgin Islands Code or other statutes of the Virgin Islands in other than a historical sense, the same is hereby amended to read "Territorial Court" or "Territorial Court of the Virgin Islands", as the case may be.

1990 V.I. Sess. Laws No. 5594:

Subject to the original jurisdiction conferred on the District Court by Section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the Territorial Court shall have original jurisdiction in all civil actions regardless of the amount in controversy.

STATEMENT OF THE CASE[1]

This petition for writ of certiorari presents the curious scenario of the judicial branch of the Virgin Islands government attempting to obtain through litigation what a co-equal branch of the Virgin Islands government, the legislature, has refused to grant by legislation, i.e. exclusive jurisdiction of local causes of action.

This cause began as an action to evict the Territorial Court from the premises it leases from Estate Thomas Mall. The action was filed pursuant to the Virgin Islands forcible entry and detainer statutes. 28 V.I.C. §§ 781 *et seq.* The sole substantive issue in the action was whether Petitioner or Respondent was entitled to possession of the leased premises. The district court denied the relief requested by Estate Thomas Mall on the condition that the Territorial Court pay the back rent by September 14, 1990. Pet. App. at 24a. The Territorial Court appealed this decision to the United States Third Circuit Court of Appeals.

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[1] The orders and opinions of the District Court of the Virgin Islands and the United States Court of Appeals for the Third Circuit are reproduced in the Appendix to the Territorial Court's Petition for Writ of Certiorari. In accord with this Court's rule that a brief in opposition "be as short as possible" appendix references to those materials will be made to the Appendix contained in the Territorial Court's Petition for Writ of Certiorari. Sup. Ct. R. 15.3. Citations to the petitioner's appendix are noted as Pet. App. at ___. Materials other than those contained in the Territorial Court's appendix are contained in an appendix to this brief in opposition. These materials will be cited as App. at ___.

The Third Circuit reversed the district court and remanded the action to the district court *with instructions to dismiss the complaint*. Pet. App. at 16a. The basis of the Third Circuit's decision was that the issues presented by the dispute were beyond the scope of the issues which could be litigated within the confines of a summary forcible entry and detainer action. Pet. App. at 14a-16a. The Third Circuit thoroughly examined the jurisdictional issue urged in the Territorial Court's petition to this court and rejected the argument of the Territorial Court. The Third Circuit also rejected the Territorial Court's petition for rehearing as to this issue.

SUMMARY OF ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner in this action is the party which prevailed before the Third Circuit. However, the Territorial Court is not satisfied with the grounds of the Third Circuit's opinion. Instead, the Territorial Court seeks to waste the resources and time of this Court to obtain a purely advisory opinion which will have no effect on this action. This action presents none of the usual grounds which would justify this Court exercising its discretion to hear the merits of this action. There is no conflict between the circuits on this question – as the only other circuit opinion which has addressed a similar issue was expressly relied upon by the Third Circuit in its opinion. Neither is the question of any great public concern: As of October 1, 1991 the Territorial Court will assume general original jurisdiction of civil actions in the United States

Virgin Islands, pursuant to legislation passed by the Virgin Islands legislature. The statutes whose interpretation the Territorial Court disputes will be soon reduced to the status of an historical footnote.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THIS ACTION DOES NOT PRESENT ANY IMPORTANT ISSUE REQUIRING RESOLUTION BY THIS COURT.

The rules of this Court outline those circumstances when review on writ of certiorari is appropriate. Sup. Ct. R. 10. None of the circumstances outlined in Rule 10 is presented by the instant action. In addition to its failure to meet the requirements of Rule 10, the instant Petition should be denied for four specific reasons not explicitly stated in Rule 10, nor related to the possible merits of the case:

(1) Petitioner failed to provide any credible factual record upon which the Court could even *begin* to review the matters asserted in the Petition;

(2) Petitioner is improperly attempting to utilize the Petition to manufacture a record which was not made below. The Petitioner has attempted to place anecdotal information and informally compiled "statistics" before this Court, assertions which were not presented in either the trial court or to the Third Circuit;

(3) The Petitioner failed to raise directly applicable decisions during the proceedings below, and thus failed to create an adequate legal record below; and

(4) According to the Petitioner's statements this matter will have virtually no retroactive effect. Further this matter will have no prospective effect because of action by the Virgin Islands legislature, effective October 1, 1991, granting the Petitioner the general original jurisdiction it apparently seeks.

Petitioner lightly attempts to avoid the most obvious impediment to this Court's review of this matter – the lack of a record below. Apparently the Petitioner did not think enough of the issue at the time of trial to create an adequate record for review on certiorari, either factually or legally. The Court need not accept Respondent's view on this point as the Petition itself presents extensive argument based on new material from grounds far outside the record. The Court is entreated to consider absurd informal studies[2], anecdotal information regarding practice in the district court[3], and

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[2] The Petitioner presents a table of statistics of a "preliminary review" of "case-load statistics." Petition for Writ of Certiorari at 17, n. 6. This information is not part of the record of this cause nor is there any indication of the reliability of the information contained.

[3] Petitioner contends that it was the District Court's "policy" to transfer actions to the Territorial Court if the amount in controversy was less than $200,000. Petitioner further asserts that "very few, if any civil cases seeking less than $200,000 were filed in the District Court." Petition for Writ of Certiorari at 16-17. These contentions are created from the whole cloth and have no basis in the sparse record created below.

numerous other factual assertions without record support.[4]

The Petitioner now attempts at the eleventh-hour to revive this issue without creating any record below. Instead Petitioner attempts to re-open the taking of evidence before this Court.

Because the matter was not thoroughly addressed below by the Petitioner, the Respondent never developed any contradictory record. Neither the trial court nor the Third Circuit were provided with the benefit of certain relevant decisions, including another decision, albeit unpublished, of the district court's St. Croix division, *Government of the Virgin Islands v. Bryan*, Criminal No. 1989-129, (D.V.I., Div. of St. Croix, January 29, 1990),

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[4] The Petitioner makes numerous references to the unwritten policy of the district court to decline entertaining cases involving less than $200,000 and what the former judges of the District Court determined at pretrial conference. Petition for Writ of Certiorari at 16-17. Petitioner also contends that "very few cases, if any were filed in the District Court since January 1, 1977, when the $200,000-jurisdiction was vested in the Territorial Court." *Id.* at 18. Absolutely no evidence was presented in the record of this action regarding the number of cases filed in the district court at any time. Counsel for Petitioner candidly admitted to the Third Circuit, during oral argument, that numerous cases involving less than $200,000 have been filed and are still filed in the District Court. It should be noted that Petitioner misrepresents the date that the $200,000-jurisdiction limit was effective. As of January 1, 1977 the Territorial Court's upper limit was $50,000. It was not until 1981 that the limit was raised to $200,000. 1981 V.I. Sess. Laws No. 4647.

included in the Appendix to this Brief. In that action the defendant moved to dismiss on the basis that the District Court was without subject matter jurisdiction over criminal charges premised on violations of territorial law. The district court roundly denied the motion as being based on an "erroneous and spurious construction of the pertinent legislative enactments,. . . . " App. at 2. The *Bryan* court further found that it need not consider the defendant's argument regarding the 1984 amendments to the Revised Organic Act.

Perhaps the most frustrating, to Respondent, is the Petitioner's assertion that this court should consider review in this action while at the same time asserting that review will have no far-reaching effects. Petition for Writ of Certiorari at 18-19. Accepting the Petitioner's circular argument this means that the Petitioner seeks review in this court of a decision which will apply only to the instant case, *a decision which will not alter one iota the complete relief Petitioner was provided by the Third Circuit.* The situation presented by the Petitioner is the complete antithesis of "an important question of federal law which has not been, but should be, settled by this Court."

A. The decision of the Third Circuit is not in conflict with any decision of another United States court of appeals, nor does it conflict with a state or territorial court of last resort.

The Third Circuit opinion addresses the proper interpretation of certain amendments to the Revised Organic Act of 1954. These amendments deal solely with the judicial system of the territory of the Virgin Islands. The limited application of the Third Circuit's interpretation is

evident due to the fact that the United States today has very few possessions with the status of unincorporated territories. One such possession is the island of Guam. The Third Circuit's ruling in this action is fully consistent with the ruling of the Ninth Circuit when it considered a similar issue with regard to the judicial system of Guam. *Agana Bay Develop. Co. (Hong Kong) Ltd. v. Supreme Court of Guam,* 529 F. 2d 952 (9th Cir. 1976). The Third Circuit opinion in this action relies heavily upon the analysis applied by the *Agana Bay* court. Pet. App. at 12a-13a. There is no conflict among the circuits which requires resolution.

Likewise the opinion of the Third Circuit is in accord with an unpublished opinion of the district court which considered a related question of the district court's subject matter jurisdiction over criminal matters. The district court found that the restriction of the district court's jurisdiction over criminal matters was dependent upon the actions of the Virgin Islands legislature. *Government of the Virgin Islands v. Bryan,* Criminal No. 1989-129, slip op. at 7-12 (D. V. I., Div. of St. Croix, Jan. 29, 1990), App. at 1-12.

There is no split of authority which requires resolution by this Court.

B. There is no important question of federal law which should be settled by this court.

Any decision of this Court as to the merits of the question presented would have no prospective application. As of October 1, 1991, before this Court will hear

this cause, the Territorial Court will assume general original jurisdiction over all civil actions. 1990 V.I. Sess. Laws. No. 5594.

C. This Court should not grant review to a prevailing party.

The instant petition presents the unprecedented circumstance of the party who prevailed below seeking further review in this Court. The Territorial Court prevailed before the Third Circuit on an issue of territorial law, i.e. the scope of issues triable in the context of a forcible entry and detainer action. Now the Territorial Court seeks to waste this Court's time in order that its pet theory may be voiced again. Prior surveys of this Court's decisions have not revealed any instance when the Court has granted a writ of certiorari upon the petition of the party prevailing below. C. Wright, *Law of Federal Courts*, § 106 (4th ed. 1983).

The Territorial Court's petition states that it is pursuing this writ because "it will affect the autonomy and stature of the entire Virgin Islands government." Petition for Writ of Certiorari at 4. This does not provide the Territorial Court with standing to seek review in this court. The Territorial Court cannot obtain any further relief in this action beyond that which was granted by the Third Circuit.[5] The Territorial Court, at this point in this

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[5] Likewise Estate Thomas Mall cannot obtain any relief in this Court from the decision of the Third Circuit. The decision of the Third Circuit reversing the district court rested upon an interpretation of territorial law not reviewable in this court.

action, has suffered no injury which this Court can redress. *See Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1938). In effect the Territorial Court seeks an advisory opinion from this court.[6]

II. THE THIRD CIRCUIT CORRECTLY HELD THAT ACTION BY THE VIRGIN ISLANDS LEGISLATURE IS REQUIRED TO DIVEST THE DISTRICT COURT OF THE VIRGIN ISLANDS OF CONCURRENT JURISDICTION OVER LOCAL CAUSES OF ACTION

The Territorial Court contends that upon the enactment of the 1984 amendments to the Revised Organic Act of 1954 the District Court was automatically divested of its jurisdiction over local actions. The Third Circuit carefully considered this contention and found it to be incorrect. If Congress had intended such a drastic change in the jurisdiction of the district court "[s]urely Congress would have specified that the divestiture was to be immediate if that is what it intended." Pet. App. at 12a.

The Third Circuit considered the effect of the 1984 amendments to the Revised Organic Act and whether

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[6] The sole issue in this litigation was possession of the leased premises. Pursuant to the Virgin Islands forcible entry and detainer statute, absolutely no issue other than bare possession can be decided in a forcible entry and detainer action. This is no longer an issue between the parties. On June 24, 1991 counsel for Respondent received correspondence from counsel for the Petitioner, dated June 13, 1991, that Petitioner had vacated the premises. Respondent has retaken possession of the premises. The letter from Petitioner's counsel is included in the Appendix to this brief. App. at 13-14.

they were effective *ex proprio vigore*, that is without the necessity of further action by the Virgin Islands legislature. Pet. App. at 10a-12a. The Third Circuit concluded that action by the local legislature was required to divest the district court of its concurrent jurisdiction. This conclusion is fully supported by the language of the amendments and the legislative history of those amendments.

The jurisdiction of the District Court of the Virgin Islands is defined by the statute which created it. The Organic Act of 1936 defined the jurisdiction of the district court and provided for the concurrent jurisdiction of the district court "with the inferior courts" created by local law. Ch. 699, § 25, 49 Stat. 1813 (1936). The Revised Organic Act of 1954 carried this principle forward providing for "general original jurisdiction" in the district court. Ch. 558, § 22, 68 Stat. 506 (1954). The 1954 act also provided that the Virgin Islands legislature could provide for the concurrent jurisdiction of local actions in the courts established by local law. Ch. 558, § 23, 68 Stat. 506 (1954). Both the 1936 Organic Act and the 1954 Revised Organic Act contemplated that the Virgin Islands legislature would define the jurisdiction of the local courts.

The Territorial Court contends that the 1984 amendments to the Revised Organic Act removed from the local legislature the power to define the jurisdiction of the local courts. In 1976 the Virgin Islands legislature created the Territorial Court. 1976 V.I. Sess. Laws No. 3876. This act defined the Territorial Court's exclusive jurisdiction in conformance with the provisions of the Revised Organic Act. Ch. 558, § 23, 68 Stat. 506 (1954); 1976 V.I. Sess. Laws No. 3876, § 2, p. 188, codified at 4 V.I.C. § 75. The 1984 amendments to the Revised Organic Act made no change

in the exclusive jurisdiction of the local courts. 48 U.S.C. § 1612 (b). The Virgin Islands legislature further defined the original jurisdiction of the Territorial Court as "*concurrent* with that of the district court in all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $50,000;. . . . " 1976 V.I. Sess. Laws No. 3876, § 2, p. 188, codified at 4 V.I.C. § 76. This limit was raised, in 1981, to $200,000. 1981 V.I. Sess. Laws No. 4647, § 1, p. 260.

The 1984 amendments to the Revised Organic Act remove the requirement of old section 23 that the general jurisdiction of the local courts must be concurrent with that of the district court. The Territorial Court wishes to take these amendments further and contends that Congress removed any discretion from the Virgin Islands legislature to provide for concurrent jurisdiction. The Territorial Court's tortured interpretation is unsupported by the language of the amendments, the legislative history of the amendments nor is it in accord with their intent. The amendments grant to the Virgin Islands legislature the absolute power to further define the jurisdiction of the local courts.

The Third Circuit correctly held that the extent of the Territorial Court's jurisdiction is a matter to be determined by the Virgin Islands legislature. Congress did not intend to unilaterally foist on the territory the burden of exclusive jurisdiction of civil actions. Instead, consistent with the prior versions of the Organic Act, Congress left this decision to the local legislature. When considering the 1984 amendments the Senate stated:

> The decision as to whether jurisdiction over strictly local causes should be vested in the district court or the local courts will be made by local law.

130 Cong. Rec. S. 10527 (August 10, 1984). The legislature has chosen to share this burden with the federal judiciary until October 1, 1991. The Territorial Court is a creation of the Virgin Islands legislature and can have no greater jurisdiction than that body provides. Petitioner's contentions otherwise are directly contrary to the Congressional intent to allow the Virgin Islands legislature the power to create and define the local courts.

CONCLUSION

Respondent Estate Thomas Mall, Inc. prays the Court to deny the Territorial Court's Petition for Writ of Certiorari.

JOHN H. BENHAM
WATTS & STREIBICH
14A Norre Gade
P. O. Box 11720
St. Thomas, Virgin Islands 00801
Tel: (809) 774-0673
Fax: (809) 776-3630

Of counsel:

CARL J. HARTMANN
201 East 28th Street
Suite 15-B
New York, N. Y. 10016
Tel: (212) 725-6327

APPENDICES

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff, vs. ADELBERT BRYAN, Defendant.	)	CRIMINAL NO. 1989-129

L. C. WRIGHT, Esq.
Special Assistant U.S. Attorney
Office of the United States Attorney
Post Office Box 3239
Christiansted, St. Croix
U.S. Virgin Islands 00822
–Attorney for Government

JEFFREY B. C. MOOREHEAD, Esq.
Law Offices of Winston Hodge
Sunny Isle Professional Building, Ste. 2
Christiansted, St. Croix
U.S. Virgin Islands 00823
–Attorney for Defendant

MEMORANDUM

RAYMOND J. BRODERICK
U.S. District Judge
Sitting by Designation

January 29, 1990

Defendant Adelbert Bryan has filed a motion to dismiss the information against him on the ground that this Court lacks jurisdiction. Defendant Bryan's claim rests on three premises. He argues first that the two offenses

which he is accused of committing – grand larceny and possession of stolen property – carry a maximum ten years' prison term each. Second, the defendant asserts that on October 1, 1987 the Virgin Islands Legislature vested in the Territorial Court authority to adjudicate every criminal action arising under local law for which the penalty is fifteen years' incarceration or less. Last, the defendant contends that given Section 22(b) of the Revised Organic Act of 1954 restricts the general original jurisdiction of the District Court to causes not vested by local law in the Territorial Court, jurisdiction over criminal actions for which the penalty does not exceed fifteen years' imprisonment resides exclusively within the Territorial Court. In consequence, the defendant argues, not only does this Court lack jurisdiction to hear the criminal proceedings against him, but also virtually every conviction and guilty plea had in the District Court of the Virgin Islands since October 1, 1987 is illegal. Because the Court concludes that the defendant's claim is predicated upon an erroneous and spurious construction of the pertinent legislative enactments, the motion to dismiss is denied.

I.

Article IV of the United States Constitution devolves upon Congress plenary power to regulate federal territories. *See Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670 (1973); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828); *United States v. Canel*, 703 F.2d 894, 896 (3d Cir.), *cert. denied*, 464 U.S. 852, 104 S.Ct. 165 (1983). Pursuant to that authority, Congress passed the Revised Organic Act of 1954, Act of July 22, 1954, ch. 558, 68 Stat. 497, 48 U.S.C. § 1541 *et seq.*, which defines the

general contours of government in the Virgin Islands. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4, 75 S.Ct. 553, 555, 99 L.Ed. 773 (1955); *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576-78 (3d Cir. 1967), *cert. denied*, 390 U.S. 1041, 88 S.Ct. 1634 (1968). In so doing, Congress established a tripartite structure, dividing power between executive, judicial, and legislative branches. *Territorial Court of the Virgin Islands v. Richards*, 673 F.Supp. 152, 157 (D.V.I. 1987), *aff'd*, 847 F.2d 108 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 390 (1988); *Municipality of St. Thomas v. Gordon*, 78 F.Supp. 440, 443-44 (D.V.I. 1948).

Section 21(a) of the Revised Organic Act created the District Court of the Virgin Islands. 48 U.S.C. § 1611(a). Although the District Court of the Virgin Islands is vested with jurisdiction to entertain federal matters, it is not an article III court. *American Fidelity Fire Ins. v. Construcciones Werl, Inc.*, 1975 St. Croix Supp. 438, 469 (D.V.I. 1975). Rather, because the District Court possesses original jurisdiction over certain questions of local law, 48 U.S.C. § 1612, and serves as an appellate tribunal for decisions by the local court, 48 U.S.C. § 1613a, it is "an institution with attributes of both a federal and a territorial court." *Barnard v. Thorstenn*, ___ U.S. ___, ___, 109 S.Ct. 1294, 1298 (1989).

Section 21 of the Revised Organic Act, as amended, Act of Oct. 5, 1984, P.L. 98-454, Title VII, § 703, Title X, § 1001, 98 Stat. 1738, 1745, 48 U.S.C. § 1612, also empowered the Territorial Legislature – a unicameral body established pursuant to Section 1 of the Revised Organic Act, 48 U.S.C. § 1571 – to create local courts and

vest within them jurisdiction over "all causes in the Virgin Islands" over which the District Court does not possess exclusive jurisdiction. 48 U.S.C. § 1611(b). On May 16, 1957, the Territorial Legislature established the Municipal Court of the Virgin Islands, *see generally Homer v. Lorillard*, 6 V.I. 558, 567-69 (Mun. Ct. 1967), which was later redesignated as the Territorial Court. Act of Sept. 9, 1976, No. 3876, § 5, 1976 Sess. L. 197, 4 V.I.C. § 2. It is the scope of that Court's criminal jurisdiction that forms the basis of the present controversy.

II.

A.

In 1976, the Virgin Islands Legislature passed Act 3876, which bestowed upon the Territorial Court original jurisdiction, concurrent with that of the District Court, over "all criminal actions wherein the maximum sentence exceeds a fine of $100 or imprisonment for six months but does not exceed imprisonment for one year or a fine as prescribed by law." The Legislature further mandated that two years after the Act's effective date the Territorial Court would assume original jurisdiction, concurrent with the District Court's, "in all criminal actions wherein the maximum sentence does not exceed imprisonment for five years or a fine as prescribed by law." Act of Sept. 9, 1976, No. 3876, § 2(b), 1976 Sess. L. 189. The measure was codified at 4 V.I.C. Section 76(b) and remained unaltered until 1984.

On December 20, 1984, the Fifteenth Virgin Islands Legislature passed Act 5040. Act 5040, Section 3 stated in full:

(a) Title 4, Section 76, subsection (b) Virgin Islands Code is amended as follows:

"(b) The Territorial court shall have original jurisdiction, concurrent with that of the district court, in all criminal actions wherein the maximum sentence does not exceed imprisonment for 15 years or a fine as prescribed by law."

(b)(1) One year after the effective date of this Act, the Territorial Court shall have original jurisdiction, concurrent with that of the District Court in all criminal actions unless within the year the Presiding Judge of the Territorial Court, after making an assessment of the case load under the jurisdiction in subsection (a) of this Section, determines that the increase of its jurisdiction would be burdensome to the court.

(2) The Presiding Judge of the Territorial Court shall report the results of the assessment mandated by paragraph (1) of this subsection to the Legislature not later than January 31, 1986.

(c) This Section shall become effective March 1, 1985.

Act of Feb. 1, 1985, No. 5040, § 3, 1984 Sess. L. 464. The Governor approved the item on February 1, 1985.

On February 28, 1985, the Sixteenth Legislature passed Act 5045, denominated by that body as a measure to "delay the effective date . . of Section 3 of Act 5040, which expands the jurisdiction of the Territorial Court." Act of Mar. 1, 1985, No. 5045, 1985 Sess. L. 3. Section 1 of Act 5045 amended Section 3 of Act 5040, although the former did nothing to disturb the substance of the two-tiered expansion of territorial jurisdiction over local criminal matters. As amended by Act 5045, Act 5040, Section

3, subsection (a) still vested in the Territorial Court "original jurisdiction in all criminal actions wherein the maximum sentence does not exceed imprisonment for 15 years or a fine as prescribed by law." Similarly, Act 5040, Section 3, subsection (b), paragraphs (1) and (2), as amended by Act 5045, still provided that one year after the effective date of Section 3, the Territorial Court would possess authority to adjudicate "all criminal actions," regardless of penalty, and that the Presiding Judge would report to the Legislature on or before a date certain. Act 5045 did, however, postpone the effective date of Act 5040, Section 3 by amending subsection (c) to read "October 1, 1987," instead of "March 1, 1985." Act 5045 was approved by the Governor on March 1, 1985.

At the "insistence" of the Territorial Court, *Government of the Virgin Islands v. James*, 23 V.I. 205, 216 (D.V.I. 1987) (Christian, J., concurring in part, dissenting in part), the Legislature promulgated Section 107 of Act 5206 in order to delay even further the effective date of Act 5040, Section 3. Passed on September 29, 1986, Act 5206 provided:

> SECTION 107. Act 5040, Section 3, subsections (b) and (c), as amended by Act 5045, Section 1, are amended to read as follows:
>
> "(b)(1) One year after the effective date of this Section, subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by Sections 21 and 22 of the Revised Organic Act of the Virgin Islands, as amended, the Territorial Court shall have original jurisdiction in all criminal actions.
>
> (2) The Presiding Judge of the Territorial Court shall assess the case load which the Court

> will assume after the increase in its jurisdiction pursuant to this Act. The Presiding Judge shall report the results of the assessment to the Legislature not later than January 31, 1991.
>
> (c) This Section shall become effective October 1, 1990."

Act of Oct. 14, 1986, No. 5206, § 107, 1986 Sess. L. 236.

B.

In interpreting a legislative pronouncement, this Court must begin with its plain language and need not review the legislative history if it is unambiguous on its face. *TVA v. Hill*, 437 U.S. 153, 184 n.29, 98 S.Ct. 2279 (1978); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201, 96 S.Ct. 1375 (1976); *Barnes v. Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126 (1985). The cumulative meaning of Acts 5040, 5045, and 5206 could not be more clear. As amended by Acts 5045 and 5206, Section 3 of Act 5040, by revising 4 V.I.C. Section 76(b), evinces an obvious intent to deposit expanded criminal jurisdiction in the territory's local court. Section 3 establishes a two-phase process by which the Territorial Court's authority to hear criminal cases will be broadened. First, subsection (a) of Section 3 declares that commencing on the Section's effective date the Territorial Court will assume original jurisdiction over criminal offenses carrying a maximum sentence not exceeding fifteen years' imprisonment. Second, subsection (b), paragraphs (1) and (2), state that one year after the Section's effective date the Territorial Court's original jurisdiction will further expand to embrace all criminal actions, irrespective of penalty, and that the Presiding Judge shall

render an administrative assessment of the legislation's impact. Subsection (c) states when Section 3 of Act 5040 shall become effective. Thus properly construed, amended Act 5040 provides that on October 1, 1990 the Territorial Court will have original jurisdiction over criminal actions in which the maximum sentence does not exceed imprisonment for fifteen years[1] and that on October 1, 1991 the Territorial Court will have original jurisdiction over all criminal actions.

The defendant's misinterpretation of these enactments is the result of two elementary errors. First, he contends that Act 5206 did not delay the expansion of territorial jurisdiction over crimes punishable up to fifteen years' imprisonment "since the legislature deliberately excluded any reference to subsection (b)" of Act 5040, Section 3, and amended only "the subsequent subparagraphs (b)(1) and (b)(2)." Defendant's Memorandum of Law, at 3. Section 3 of Act 5040, however, does not even contain a subsection (b) as such. Subsection (b) of Section 3 is immediately cleaved into two paragraphs, (1) and (2), without any matter attached to a subsection independently denominated as subsection (b). The "subsection (b)" upon which the defendant relies is not a subsection of Section 3 at all, but rather a reference to subsection (b) of 4 V.I.C. § 76 that is contained within *subsection (a)* of Act 5040, Section 3.

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[1] The Court therefore approves Equity Publishing Company's annotation to 4 V.I.C. § 76(b), which states that the Territorial Court's fifteen year jurisdiction will begin on October 1, 1990.

Second, to reach his conclusion, the defendant, in essence, interprets subsection (c) to govern the effective date of only subsection (b), paragraph (1), but not the effective date of subsection (a). This reading is irrational and runs directly counter to the plain language of the Acts. Subsection (c), in each of its versions, delineates the effective date of the "Section." As amended by Act 5206, subsection (c) of Act 5040, Section 3, unreservedly states: "This Section shall become effective October 1, 1990." The Section to which it refers, of course, is Section 3, of which subsections (a) and (b)(1)-(2) are coordinate components. *See* Act 5040, § 3(b)(1) (referring to "subsection (a) of this Section"); Act 5040, § 3(b)(2) (referring to "paragraph 1 of this subsection); Act 5045, § 1 (referring to "Section 3 of Act 5040"); Act 5206, § 107 (referring to "Act 5040, Section 3, subsections (b) and (c)"). Subsection (c) simply contains no terms restricting its operation to subsection (b), paragraph (1). Indeed, subsection (b), paragraph (1) itself, as amended by Act 5206, refers to the "effective date of this Section," not of "this subsection" or "this paragraph." Moreover, the defendant's interpretation is internally inconsistent, for he agrees, as he must, that the amendment to subsection (c) introduced by Act 5045 did in fact postpone the effective date of Act 5040, Section 3, subsection (a), but denies that a virtually identical change to subsection (c) proclaimed by Act 5206 did not delay the effective date of Act 5040, Section 3, subsection (a).

C.

Precedent also compels today's disposition.[2] In *Government of the Virgin Islands v. James*, 23 V.I. 205 (D.V.I. 1987), a case which the Defendant failed to cite either in his brief or at argument, a three-judge territorial appellate panel considered the effect that this series of legislation had upon the criminal jurisdiction of the Territorial Court. Construing the precise enactments at issue here, Presiding Judge Christian wrote:

> It is knowledge so common as not to require statutory reference, that in former times the Territorial Court (then the Municipal Court) could not impose a sentence in excess of one year. Later on that authority of the Territorial Court was increased to the imposition of a sentence of not more than five years. Recently the Legislature of the Virgin Islands, recognizing that the sentencing limits of the judges of the Territorial Court of the Virgin Islands was a maximum of five years, undertook by Act No. 5040, approved February 1, 1985, to increase the sentencing authority of that court to a maximum of fifteen years. However, for reasons not here pertinent, the Legislature deferred the effective date of

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[2] Further, the 1989 *Bluebook*, an official publication of the Virgin Islands which describes the structure of the local government, explicitly states that the territorial court possesses "original and exclusive jurisdiction" over "all criminal cases in which the maximum punishment that may be imposed does not exceed a fine of $100 or imprisonment of six months, or both" and that the territorial court also possesses "original and concurrent jurisdiction with the District Court . . . over criminal cases in which the maximum sentence does not exceed imprisonment for five years or a fine as prescribed by law." United States Virgin Islands Bluebook 37 (3d ed. 1989).

> that enactment to October 1, 1988, by Act No. 5045, approved March 1, 1985, and at the insistence of the very territorial Court postponed the effective date further, to January 31, 1991, by Act No. 5206 duly passed by the Legislature on September 29, 1986, and permitted to become law without executive approval as of October 14, 1986.

Id. at 216 (Christian, J., concurring in part, dissenting in part).

The *James* majority essentially was of the same view. The court initially noted that "[t]he territorial court has concurrent jurisdiction with the district court in all criminal actions wherein the maximum sentence does not exceed imprisonment for five years." *Id.* at 207. The Court then stated that although Act 5040 had deposited in the Territorial Court jurisdiction over criminal offenses for which the maximum sentence did not exceed fifteen years, Act 5206 had extended "the effective date of this provision" to October 1, 1991. *Id.* at 207 n.1. Although this Court disagrees with the *James* panel insofar as it identified the effective date of amended Act 5040, Section 3, subsection (a) as either January 31, 1991 or October 1, 1991, it is manifest that all three members of the panel, including one territorial judge, understood Act 5206 to delay the expansion of the Territorial Court's jurisdiction over not only all crimes, but also fifteen year crimes.

III.

In view of today's disposition, the Court need not evaluate the thesis that the Revised Organic Act as amended in 1984, Act of October 5, 1984, P.L. 98-454, Title

VII, § 703, Title X, § 1001, 98 Stat. 1738, 1745, 48 U.S.C. § 1612, renders the respective general original jurisdictions of this Court and the Territorial Court mutually exclusive. The Court does note, however, that the defendant's assertion is contrary to established precedent construing the Revised Organic Act prior to 1984. The Third Circuit repeatedly stated before the enactment of P.L. 98-454 that the Revised Organic Act did not permit the actions of the Territorial Legislature to limit the District Court's jurisdiction. *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1057 n.7 (3d Cir. 1982); *Excavation Const. Inc. v. Quinn*, 673 F.2d 78, 80-81 (3d Cir. 1982); *Pan American World Airways v. Government of the Virgin Islands*, 459 F.2d 387, 391 (3d Cir. 1972); *cf. Thorstenn*, 109 S.Ct. at 1298 (dictum); *see In re Alison*, 837 F.2d 619, 622 (3d Cir. 1988) (stating "overall congressional intention discernible" in title VII of P.L. 98-454 is greater territorial autonomy over local appellate structure). The defendant does not even mention this line of caselaw, let alone discuss its continued vitality. Because the Court has concluded Act 5206 defers until October 1, 1990 the expansion of Territorial Court jurisdiction over criminal actions wherein the maximum penalty is fifteen years' incarceration, the Court need not address the question whether under the amended Revised Organic Act the Legislature's enlargement of general original jurisdiction in the Territorial Court, when it takes effect, will divest this Court of the original concurrent jurisdiction over matters of local law that it currently possesses.

An appropriate order follows.

TERRITORIAL COURT OF THE VIRGIN ISLANDS
[SEAL]
774-6680

OFFICE OF
GENERAL COUNSEL

P.O. BOX 70
CHARLOTTE AMALIE,
ST. THOMAS
VIRGIN ISLANDS 00801-0070

June 13, 1991

John H. Benham, III, Esq.
14A Norre Gade
P.O. Box 11720
St. Thomas, Virgin Islands 00801

Re: Premises located at 2-6B Vitraco Park

Dear Atty. Benham:

With reference to your letter of the 10th instant as you are well aware, shortly after it became the landlord, your client undertook to constructively evict the Court from the subject premises. This eviction was evidenced by, among other things, the repeated refusal to supply the premises with useable water despite your client's obligation to do so. This conduct on the part of your client became so egregious that we were left with no choice but to completely vacate the premises in May 1991.

The fact of our constructive eviction has been heretofore communicated to both you and your client both

orally and in writing, a fact with which you are well aware.

Sincerely,

/s/ Leon A. Kendall
LEON A. KENDALL
General Counsel

LAK/ham

cc: Presiding Judge Hodge
Mrs. Viola Smith

REPLY BRIEF

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

(3)

No. 90-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

ESTATE THOMAS MALL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

LEON A. KENDALL *
General Counsel
TERRITORIAL COURT OF THE VIRGIN ISLANDS
Barbel Plaza
Post Office Box 70
St. Thomas, V.I. 00801
(809) 774-6680
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	ii
CLARIFICATION OF STATUTES INVOLVED	1
CLARIFICATION OF STATEMENT OF THE CASE	2
CLARIFICATION OF SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS ACTION PRESENTS AN IMPORTANT ISSUE INVOLVING THE POWER OF THIS COURT TO SUPERVISE THE THIRD CIRCUIT COURT OF APPEALS	3
A. The Decision of the Third Circuit Is in Conflict With the Decisions of This Court and Time-Honored Rules of Statutory Construction, Thereby Requiring the Exercise of the Court's Supervisory Powers	7
B. Whether a Federal Court Should Continue to Exercise Subject Matter Jurisdiction Where None Exists Is Always an Important Question of Federal Law	7
C. Petitioner Was Not the Prevailing Party With Respect to the Important Issue of the District Court's Subject Matter Jurisdiction	8
II. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT THE DISTRICT COURT WAS NOT DIVESTED, *EX PROPRIO VIGORE*, OF CONCURRENT JURISDICTION OVER FORCIBLE ENTRY AND DETAINER (F.E.D.) ACTIONS UPON THE EFFECTIVE DATE OF P.L. 98-454	8
A. The Matter Is Not Moot	9
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Agana Bay Development Co. Ltd. v. Supreme Court of Guam, 529 F.2d 952 (9th Cir. 1976) 3

Government of the Virgin Islands v. Bryan, Criminal No. 1989-129, slip opinion (D.V.I., St. Croix, Jan. 29, 1990) 6

Statutes and Regulations:

United States Code:

48 U.S.C. § 1612(b) 4, 5

Virgin Islands Code:

Title 4, Section 32 .... 1, 2

Title 28, Section 782(b) 2, 6, 8, 9

Legislative Materials:

P.L. 98-454 .... 1, 2, 6, 8, 9

Revised Organic Act of 1954, as amended, Section 22 .... 1, 2

United States Supreme Court Rules:

Rule 10.1(a) 2, 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1564

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

ESTATE THOMAS MALL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

CLARIFICATION OF STATUTES INVOLVED

In an attempt to mislead the Court, Respondent cites statutes which are both obsolete and irrelevant. Specifically, Section 22 of The Revised Organic Act referred to in 4 V.I.C. § 32 as cited by Respondent, was substantially amended by P.L. 98-454 to remove the provision dealing with the District Court's authority to transfer cases from the local court. Accordingly, a review of Section 22 of The Revised Organic Act as amended by P.L. 98-454 reveals no such authority. Additionally, as revised by P.L. 98-454, the District Court's original jurisdiction

no longer extends to "all other causes in the V.I. exclusive jurisdiction over which is not conferred by this act upon the inferior courts of the Virgin Islands." This language was removed from Section 22 by Congress with the enactment of P.L. 98-454, with the result that such authority is no longer vested in the District Court. Thus, the continued viability of 4 V.I.C. § 32 which was enacted prior to P.L. 98-454 is highly questionable at best.

CLARIFICATION OF STATEMENT OF THE CASE

Respondent's statement that the Petitioner is "attempting to obtain through litigation what a co-equal branch of the Virgin Islands Government . . . has refused to grant by legislation i.e. exclusive jurisdiction of local causes of action" is false. It is false because the V.I. Legislature has since 1957 granted the local court exclusive and original jurisdiction over F.E.D. actions. 28 V.I.C. § 782(b). It is also false because a review of the petition and the record below clearly reveals that this case is not about the grant to the local Court of exclusive jurisdiction over local causes of action, but, rather, the federal judiciary's refusal to accept the local Court's exclusive jurisdiction over F.E.D. actions, contrary to the express mandate of Congress.

CLARIFICATION OF SUMMARY OF ARGUMENT

Contrary to Respondent's contention, the only portion of the Third Circuit's decision with which Petitioner is dissatisfied is its disposition of the threshold and fundamental issue presented i.e. the District Court's lack of subject matter jurisdiction over F.E.D. actions. Additionally, contrary to Respondent's contention which is once again false and misleading, this action presents a clearly recognized ground justifying the Court's exercise of its discretion to hear the merits of this case, viz, the need, pursuant to Rule 10.1(a) of this Court to supervise the

Third Circuit in order to ensure that it conforms to the mandate of Congress divesting the District Court of concurrent jurisdiction over local F.E.D. actions. Furthermore, the decision relied upon by the Third Circuit i.e. *Agana Bay Development Co. v. Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976) is clearly distinguishable from the case at bar, thus it cannot be deemed to be in harmony with the case at bar.

Finally, contrary to Respondent's contention, the matter is of great concern to the people of The Virgin Islands because if this Court does not intervene to restrain the District Court from continuing to exercise jurisdiction where none exists, it would only result in compounding the miscarriage of justice caused by such an illegal exercise of jurisdiction.

ARGUMENT

I. THIS ACTION PRESENTS AN IMPORTANT ISSUE INVOLVING THE POWER OF THE SUPREME COURT TO SUPERVISE THE THIRD CIRCUIT COURT OF APPEALS.

In an opposition noteworthy for its *ad hominem* argumentation, Respondent has failed to address the threshold issue presented by the petition for Writ of Certiorari. Simply stated, the issue is whether the Court should exercise its supervisory power over the Third Circuit to prevent the continued exercise of federal jurisdiction over purely local Forcible Entry and Detainer (F.E.D.) actions contrary to the express intent of Congress. By framing the issue as not presenting a conflict with any decision of another U.S. Court of Appeals or state or territorial court, Respondent is in effect attempting to mislead the Court into believing that a conflict with other circuits is the only basis for granting the Writ. In fact, there are several other bases set forth in Rule 10.1 of this Court, including the one relied upon by Petitioner which contemplates issuance of the Writ as follows:

> (a) When a United States Court of Appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's Power of Supervision.

A review of the petition clearly reveals that the U.S. Court of Appeals for the Third Circuit has not only violated this Court's decisions and time-honored rules regarding statutory construction but it has sanctioned the District Court's improper exercise of federal jurisdiction based upon an erroneous construction of 48 U.S.C. § 1612(b). Such conduct by the Third Circuit should not escape this Court's exercise of its supervisory powers in order to ensure the proper exercise of federal jurisdiction. Clearly, the petition makes a compelling case for this Court's intervention in order to prevent the continuing miscarriage of justice that would result in the Virgin Islands if the decision of the Third Circuit is permitted to stand. Accordingly, Respondent's four reasons for denying the petition must be rejected as follows:

(1) Because the issue presented is legal, involving as it does the District Court's jurisdiction over purely local F.E.D. actions, the establishment of a factual record is not dispositive of this petition except that the Third Circuit assumed certain facts not in the record as the basis for its decision which Petitioner was forced to refute. Indeed, Respondent cannot be heard to now complain about the lack of a factual record when it was Respondent who was totally responsible for this situation. Specifically, the instant action was a *summary* proceeding brought by Respondent because of what it perceived to be the slow pace of a previously filed civil action against Petitioner seeking the identical relief sought in the case at bar. Because of the summary nature of the action, exactly twenty-eight (28) days elapsed from the time of filing to the hearing on the merits. See Pet. App., page 18a. It is thus clear that Respondent's attempt to blame Petitioner for the lack of a factual or legal record is at

best inartful. At worst, it is but yet another attempt to mislead the Court. In any event, the facts surrounding this case were amply established and set forth in the District Court's and Third Circuit's decisions which are contained in the Appendix to the petition. Accordingly, no credence can be given to the false statement of Respondent that the petition lacks a factual record for consideration by the Court.

(2) Similarly false and misleading is Respondent's statement that Petitioner is attempting to "manufacture a record which was not made below." A review of the record below clearly reveals that in its Petition for Rehearing which was timely and properly served upon Respondent, see attached Appendix, Petitioner challenged the Third Circuit's reliance on non-existent facts in concluding that "hundreds or even thousands of civil actions that the District Court has processed in the last six years" would be thrown into confusion if it accepted Petitioner's construction of 48 U.S.C. § 1612(b). The statistics offered by Petitioner to refute this erroneous finding by the Third Circuit which has no basis in the record were not "manufactured" by Petitioner but were provided by the Chief Deputy Clerk of the District Court, a fact well known to Respondent which it seeks to challenge by resorting to cynicism rather than contrary empirical evidence.

(3) Equally meritless is Respondent's contention that Petitioner has failed to raise directly applicable decisions during the proceedings below, thereby failing to create an adequate legal record. In fact, Petitioner has repeatedly contended that this case presents an issue of first impression in the Virgin Islands, hence the lack of any reference to cases on point from other circuits. Accordingly, once again, no credence can be given to Respondent's false statement to the contrary.

(4) Contrary to Respondent's contention, the continued exercise by the District Court of jurisdiction over F.E.D.

and other purely local actions will have a devastating prospective effect on litigants in the Virgin Islands. By exercising jurisdiction where none exists, the District Court will be acting contrary to law while denying to litigants the proper forum to have their cases and controversies adjudicated as intended by Congress when it granted increased local autonomy to the local government. Moreover, any prospective expanded jurisdiction to be granted to the local court by the local Legislature would provide no increase in jurisdiction with respect to F.E.D. actions since the local Court is already vested with such jurisdiction pursuant to 28 V.I.C. § 782(b). Accordingly, the District Court should not be permitted to continue to exercise jurisdiction over such cases where, as here, Congress has specifically divested it of such jurisdiction.

The case of *Government of the Virgin Islands v. Bryan* relied upon by Respondent is totally irrelevant to the instant case. In the first place, *Bryan* is a criminal case. Secondly, the case involved the determination of a local statute expanding the local Court's criminal jurisdiction. In the case at bar, however, such enabling legislation was totally unnecessary because the local legislature had, prior to the enactment of P.L. 98-454, vested original jurisdiction over all F.E.D. actions in the local Court. Moreover, given Respondent's admission that *Bryan* did not deal with the interpretation of the 1984 amendments to the Revised Organic Act (P.L. 98-454), that case is irrelevant since the case at bar centers around an interpretation of the amendments in question. Accordingly, Respondent's reliance on an unpublished opinion of a case that is totally inapposite to the case at bar must be rejected.

A. The Decision of the Third Circuit Is in Conflict With the Decisions of This Court and Time-Honored Rules of Statutory Construction, Thereby Requiring the Exercise of the Court's Supervisory Power.

A review of the petition clearly reveals the gross departure by the Third Circuit from the decisions of this Court and time-honored rules regarding statutory construction. This departure was compounded by the Third Circuit's reliance on non-existent facts, speculation and surmise to reach a decision that was obviously result-oriented rather than based on sound legal reasoning. It is respectfully submitted that because of this remarkable departure from accepted judicial precedent, the invocation of this Court's supervisory power over the Third Circuit is in order.

Respondent's focus on the lack of a conflict with any decision of another circuit is myopic. Specifically, it conveniently ignores the fact that such conflict is not the only reason set forth in Rule 10.1(a) for the exercise of this Court's jurisdiction. It is our contention that a conflict with the decisions of this Court and time-honored rules of statutory construction merits consideration by this Court, as provided in that same Rule. The narrow interpretation of the rule by Respondent must be rejected. The Third Circuit has so far departed from the accepted and usual course of judicial procedure and sanctioned such a departure by the District Court of the Virgin Islands that this Court should grant Certiorari to exercise its supervisory power over the Third Circuit.

B. Whether a Federal Court Should Continue to Exercise Subject Matter Jurisdiction Where None Exists Is Always an Important Question of Federal Law.

Respondent's contention that any decision by this Court will have no prospective effect is false. As noted heretofore, if the decision of the Third Circuit is permitted to stand, the District Court will continue to exercise jurisdiction which has been divested by Congress in its enact-

ment of P.L. 98-454. Whether this Court should sanction the continued exercise of such jurisdiction is a very important question of federal law. Moreover, this Court cannot rely on a prospective vesting of jurisdiction as a basis for declining to presently exercise its supervisory power over the Third Circuit, especially where, as here, consideration is being given to postponing the effective date of such jurisdiction. In any event, as noted heretofore, the prospective jurisdiction in question is irrelevant to the case at bar. Accordingly, Respondent's contention must be rejected.

C. Petitioner Was Not the Prevailing Party With Respect to the Important Issue of the District Court's Subject Matter Jurisdiction.

Petitioner has pursued this litigation because of the Third Circuit's disregard for Congressional policy granting increased judicial autonomy to the people of the Virgin Islands. Unless this Court exercises its supervisory power to correct this usurpation of Congress' mandate, the result would in all probability be not only the continued illegal exercise of jurisdiction over F.E.D. actions by the District Court, but this illegality would continue indefinitely into the future.

II. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT THE DISTRICT COURT WAS NOT DIVESTED, *EX PROPRIO VIGORE*, OF CONCURRENT JURISDICTION OVER F.E.D. ACTIONS UPON THE EFFECTIVE DATE OF P.L. 98-454.

Petitioner has already set forth cogent authority showing that upon the effective date of P.L. 98-454, the District Court was divested of concurrent jurisdiction over F.E.D. actions since at that time original jurisdiction over such actions was "then vested" in the local Court pursuant to 28 V.I.C. § 782(b). Accordingly, upon the effective date of the Act (i.e. 90 days after its enactment on October 5, 1984, or, or on about January 5, 1985), the

District Court's concurrent jurisdiction over F.E.D. actions set forth in 28 V.I.C. § 782(b) ceased. With the enactment of P.L. 98-454, therefore, the District Court was divested, *ex proprio vigore*, of concurrent jurisdiction over F.E.D. act ons. Moreover, since the local Court was "then vested" with original jurisdiction over F.E.D. actions prior to the enactment of PL 98-454, there could be no need for the local Legislature to re-enact a law vesting the identical original jurisdiction over FE.D. actions in the local Court. Such an enactment would be a redundancy.

Except for restating the erroneous analysis of the 3rd Circuit, Respondent has added nothing to refute Petitioner's contention that the District Court was divested, *ex proprio vigore*, of concurrent jurisdiction over F.E.D. actions upon effective date of P.L. 98-454.

A. The Matter Is Not Moot.

In another obvious attempt to mislead this Court, Respondent suggests that the case is moot because it constructively evicted Petitioner from the premises. This fact, however, is irrelevant to the District Court's prior and continuing improper exercise of jurisdiction over F.E.D. actions. If this Court declines to exercise its supervisory power over the Third Circuit, the result would be precisely that noted heretofore i.e. the District Court's usurpation of the local judiciary's autonomy to hear and decide local F.E.D. actions as mandated by Congress. Thus, the illegal exercise of subject matter jurisdiction would not be moot, but would be alive and well and only this Court can stop this illegality by granting the Petition for Certiorari.

CONCLUSION

Based upon the foregoing, Petitioner prays that the Court should exercise its supervisory power and preserve the judicial autonomy of the Virgin Islands by granting the Petition for Writ of Certiorari.

Respectfully submitted,

LEON A. KENDALL *
General Counsel
TERRITORIAL COURT OF THE
VIRGIN ISLANDS
Barbel Plaza
Post Office Box 70
St. Thomas, V.I. 00801
(809) 774-6680
Counsel for Petitioner

Date: July 17, 1991

* Counsel of Record

APPENDIX

VI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee/cross-appellant's Petition for Rehearing was hand-delivered to John H. Benham, III, Esquire, Counsel for Appellant/cross-appellee, Estate Thomas Mall, Inc., c/o Watts and Streibich, 14A Norre Gade, St. Thomas, United States Virgin Islands, this 30th day of January, 1991.

/s/ M. Grant